INDEX TO JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos.
19065, 19113, 19114, 19153, 19154,
19155, 19156, 19212, 19213, 19214,
19218

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; NELSON BUNKER HUNT; HUNT OIL COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petitions to Review and Set Aside Orders of the Federal Power Commission

---

JOINT APPENDIX

2

(Received Feb. 15, 1961)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1221

In the Matter of:
H. L. HUNT, Operator, *et al.*

Application for Certificate of Public Convenience and Necessity for an Independent Producer Covering A Proposed Sale of Natural Gas to Natural Gas Pipeline Company of America, Alvin City Field, Brazoria County, Texas and for Temporary Authority to Commence Service Immediately

COMES NOW H. L. HUNT (hereinafter referred to as "Applicant"), for and on behalf of himself and other coowners hereinafter designated whose gas may be subject to this Application, and hereby makes application for a Certificate of Public Convenience and Necessity pursuant to the terms of Section 7 of the Natural Gas Act, as amended, authorizing the sale of natural gas hereinafter described to Natural Gas Pipeline Company of America (hereinafter referred to as "Natural").

This filing is made under compulsion of the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders, without admitting that the Federal Power Commission has jurisdiction over either Applicant or the subject matter of this Application, without prejudice to the rights of Applicant

3

to contest the validity of said orders, and without prejudice to Applicant's rights to contest the jurisdiction of the

Commission over the subject matter of this Application; but specifically reserving all rights to pursue any and all remedies which Applicant may have relating to the asserted jurisdiction of the Commission.

In support of this Application, Applicant respectfully shows as follows:

I

DESCRIPTION OF APPLICANT
Section 157.24(a)(1)

The exact legal name of Applicant is H. L. Hunt. Applicant is a natural born citizen of the United States, with his principal office and place of business at 700 Merchantile Bank Building, Dallas 1, Texas. Applicant is authorized to do business in all states of the United States.

II

PREDECESSORS IN INTEREST
Section 157.24(a)(2)

Applicant has no predecessor in interest bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

III

PERSONS ON WHOM PAPERS ARE TO BE SERVED

The name, title and post office address of the persons to whom correspondence or communications in regard to this Application are to be addressed are:

H. L. Hunt
700 Merchantile Bank Building
Dallas 1, Texas
Attn: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

IV

Sales to Be Certificated
Section 157.24(a)(4)

The purpose of this Application is to obtain a Certificate of Public Convenience and Necessity authorizing the sale of natural gas produced from the well located on the H. L. Hunt-Alvin Gas Unit No. 6 in the Alvin City Field, Brazoria County, Texas. Applicant proposes to sell the gas to be produced to Natural under and pursuant to the terms of that certain Gas Sales Contract dated December 15, 1960, between Applicant, as Seller, and Natural, as Buyer. Applicant has been informed, and therefore states on information and belief, that Natural will transport or sell for resale in interstate commerce such natural gas or portions thereof.

(i) All of Applicant's gas sold to Natural pursuant to said Contract will be produced from the above described unit in which Applicant has a working interest and which Applicant is the operator of. The point of delivery to Natural will be at a mutually agreeable point in the Alvin Area in Brazoria County, Texas, which will be the same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959, with Texas Illinois Natural Gas Pipe Line Company, wherein Applicant received a Certificate of Public Convenience and Necessity to commence sales at an initial price of 20¢ per MCF to Peoples Gulf Coast Natural Gas Pipe Line Company by Order issued July 1, 1960, under Docket Nos. G-19086, *et al.* None of Applicant's gas sold to Natural will be purchased by Applicant from third parties.

(ii) Such sale of gas does not involve the use of any of Applicant's pipelines subject to the jurisdiction of the Commission.

(iii) Applicant does not propose to serve any communities with gas either at wholesale or retail.

(iv) Applicant does not propose to deliver or sell gas to any "main line industrial customers" in this Application.

(v) The sale proposed herein does not involve the use of any major pertinent properties and facilities subject to the jurisdiction of the Commission.

V

Summary of Contract of Sale
Section 157.24(a)(5)

In compliance with the Commission's Regulations, the following is a summary of the Gas Sales Contract which will govern the sale proposed herein, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference:

1. Name of Seller:—H. L. Hunt
2. Name of Purchaser:—Natural Gas Pipeline Company of America
3. Location of Sale:—Alvin City Field, Brazoria County, Texas
4. Date of Contract:—December 15, 1960
5. Initial Price per MCF (including tax reimbursement): —20¢
6. Measurement Pressure Base:—14.65 psia

7. Types of Escalation Provisions:—Periodic

8. Hydrocarbon liquids included:—No

6

9. Other Price Adjustments:—Reimbursement of new taxes

10. Estimated Initial Volumes (MCF per day):—1,179

11. Delivery Pressure:—Sufficient to enter Buyer's pipeline; not to exceed 1,000 psig.

12. Delivery Point:—The same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959, with Texas Illinois Natural Gas Pipe Line Company, which sale was certified by this Commission at an initial price of 20¢ per MCF by order issued July 1, 1960, under Docket Nos. G-19086, *et al.*

VI

Exhibits

Exhibit "A"—Map

There is attached hereto as Exhibit "A" a general map relating to the proposed sale of gas described hereinabove, setting forth the general geographical location of the properties covered by this Application. Said map does not reflect the items mentioned in Subparagraphs (b), (c), (d), (e) and (f) of Section 157.25 of the Commission's Regulations since same are not applicable to the subject sale.

Exhibit "A-1"—Map

There is attached hereto as Exhibit "A-1" a map of the Alvin Area which shows the location of the well (red dot) located on the H. L. Hunt-Alvin Gas Unit No. 6 from which the

gas will be produced. In addition, the point of delivery to Natural is shown by a red arrow which is the same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959, which was approved by this Commission in its Order issued July 1, 1960, under Docket Nos. G-19086, *et al.* All sales of gas produced from the wells listed on the map have been previously certificated by this Commission at an initial price of 20¢ per MCF. This Commission in its Opinion No. 321 issued May 22, 1959, In the Matter of *Trunkline Gas Company, et al.*, Docket Nos. G-15394, *et al.*, certificated a sale to Trunkline Gas Company at an initial price of 20¢ per MCF; that sale to Trunkline at the 20¢ per MCF price is shown in solid black. This Commission in its Order issued July 1, 1960, in Docket Nos. G-19086, *et al.*, certificated sales to Peoples Gulf Coast Natural Gas Pipe Line Company at an initial price of 20¢ per MCF; those sales to Natural are shown by the striped circles.

Exhibit "B"—Contract

There is attached to this Application as Exhibit "B" a copy of that certain Gas Sales Contract dated December 15, 1960, by and between H. L. Hunt, as Seller, and Natural Gas Pipeline Company of America, as Buyer. Said Gas Sales Contract is market Exhibit "B" for identification and made a part hereof for all purposes.

8

Exhibit "C"—List of Coowners

Attached hereto is a list of the coowners and the percentum of ownership of each in the well located on the H. L. Hunt-Alvin Gas Unit No. 6 from which Applicant is proposing to sell gas to Natural in this Application.

VII

Temporary Authorization
Section 157.28

Applicant hereby declares his intention to invoke Section 157.28 of the Commission's Order No. 193 issued November 20, 1956, for temporary authority to begin the immediate sale of natural gas which is the subject matter of this Application. In connection therewith Applicant states as follows:

1. The sale will be made to Natural in accordance with the Contract attached hereto as Exhibit "B".

2. An economic hardship exists which results from the necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than Natural.

3. This temporary authorization does not apply to the termination of any sale or transportation or with respect to service proposed to commence more than thirty (30) days from

9

the date of filing this statement as required by Paragraph (c) of Section 157.28.

4. Natural has been authorized to construct and operate such facilities as may be necessary to enable Applicant to make delivery to Natural of the gas proposed to be sold by Applicant. Natural's authorization is set forth in the Commission's Order issued July 1, 1960, under Docket Nos. G-19086, *et al.*

Since this Commission has previously certificated sales of gas at an initial price of 20¢ per MCF in the same field

and area, Applicant should receive temporary authorization to commence sales immediately without price condition. Failure to issue Applicant temporary authorization to commence sales at an initial price of 20¢ per MCF will be discriminatory as well as an abuse of the Commission's discretion and will subject Applicant to economic hardship as well as possible liability in view of such discrimination.

VII

Facilities

Applicant's description or showing of or reference to any facilities in this Application or in any exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a certificate of public

10

convenience and necessity for the construction or operation of such facilities. All such facilities constitute, in the opinion of Applicant, facilities for the production or gathering of natural gas, or both, within the meaning of Section 1(b) of the Natural Gas Act, whether or not Applicant is a natural gas company, and, therefore, no certificate of public convenience and necessity is required or sought for such facilities.

Wherefore, Applicant respectfully requests:

That it be issued a Certificate of Public Convenience and Necessity authorizing it to make the foregoing sale of gas under the aforesaid Contract and that there be issued immediately the requisite temporary authorization to commence such sale as above requested, and Applicant hereby requests that the intermediate decision procedure be omitted and oral argument and opportunity for filing ex-

ceptions to the decision of the Commission be waived, and requests that this Application be heard under the shortened procedure.

Applicant has caused this Application to be subscribed by his duly authorized Attorney at Dallas, Texas, this 10th day of February, 1961.

Respectfully submitted,

H. L. Hunt
By Robert W. Henderson
Robert W. Henderson


13
H. L. Hunt
EXHIBIT "A"
DALLAS
KAUFMAN
VAN ZANDT
WOOD
HARRISON
GREGG
ELLIS
HENDERSON
SMITH
PANOLA
RUSK
NAVARRO
ANDERSON
CHEROKEE
SHELBY
FREESTONE
NACOGDOCHES
LIMESTONE
SAN AUGUSTINE
HOUSTON
ANGELINA
SABINE
TEXAS
LEON
TRINITY
LOUISIANA
NEWTON
TYLER
JASPER
POINT OF DELIVERY TO
Natural Gas Pipeline Co. of America
BRAZOS
GRIMES
ALVIN CITY FIELD
LEE
HARDIN
MONTGOMERY
LIBERTY
ORANGE
SABINE RIVER
AUSTIN
HARRIS
JEFFERSON
FAYETTE
CHAMBERS
COLORADO
FORT BEND
GALVESTON
LAVACA
WHARTON
BRAZORIA
JACKSON
MATAGORDA
VICTORIA
CALHOUN

17

(Received Feb. 15, 1961)

FEDERAL POWER COMMISSION

GAS SALES CONTRACT

THIS CONTRACT made as of the 15th day of December, 1960, by and between NATURAL GAS PIPELINE COMPANY OF AMERICA, a Delaware corporation, herein called "Pipeline", and H. L. HUNT, herein called "Seller";

WITNESSETH:

That in consideration of the sum of Ten Dollars ($10.00) paid by Pipeline to Seller, receipt of which is acknowledged, the parties agree as follows:

* * * * * * * * * *

33

ARTICLE NINTH

PRICE, BILLING AND PAYMENT

1. Pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder the prices stated as hereinafter provided: for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents; for gas delivered during the second four (4) year period twenty-two (22) cents; for gas delivered during the third four (4) year period

34

twenty-four (24) cents; for gas delivered during the fourth four (4) year period twenty-six (26) cents; for gas delivered thereafter, twenty-eight (28) cents.

2. After deliveries of gas have commenced, Pipeline shall, on or before the twentieth (20th) day of each month,

render to Seller a statement showing the quantity of gas delivered during the preceding calendar month and any adjustments made by Pipeline, and shall pay Seller the amount due for all such gas.

3. Notwithstanding the provisions of paragraph two (2) above, in the event Seller's gas is delivered hereunder commingled with the gas of others, on or before the tenth (10th) day of each month, Pipeline shall render Seller a statement showing the volume of commingled gas delivered during the preceding calendar month, and within ten days thereafter Seller shall forward or cause to be forwarded to Pipeline a statement, upon which Pipeline may rely, showing the volume of the commingled gas attributable to Seller and the volumes thereof attributable to parties other than Seller, for the preceding calendar month, the sum of which shall equal the total volume metered by Pipeline. Within ten days thereafter Pipeline shall pay Seller the amount due for gas delivered during the preceding calendar month and shall furnish Seller with sufficient information to explain and support any adjustments made by Pipeline in determining the amount due Seller.

4. Each party hereto shall have the right at all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to this contract. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

Article Tenth

Taxes

Pipeline shall reimburse Seller for three-fourths (¾) of any increase

occurring after the date of this contract, in the total tax paid or payable per one thousand (1,000) cubic feet by Seller and/or Seller's royalty owners, occasioned by any change in the rate, tax base, or basis of computation of the existing production or severance tax or by the imposition or substitution of any new excise tax, including sales, occupation, severance, gathering, or other taxes of like nature imposed upon Seller in respect to gas delivered under this contract.

43

(Docketed Mar. 17, 1961)

Docket No. CI61-1221
H. L. Hunt, Operator, *et al.*

Airmail

H. L. Hunt
700 Merchantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

Temporary authority is hereby issued to H. L. Hunt, Operator, et al., to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America as proposed in Docket No. CI61-1221, subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

Your related proposed rate schedule will be considered accepted for filing upon compliance with the above conditioned authorization to be effective on the date of initial delivery subject to the provisions of Sections 154.94(c) and 154.101 of the Commission's regulations under the Natural Gas Act.

In view of the above conditions, the billing submitted with your filing is not applicable and accordingly is returned herewith.

The rate schedule has been designated as follows:

Description	*Designation*
Contract 12-15-60	H. L. Hunt, (Operator), et al. FPC Gas Rate Schedule No. 34

Please advise the Commission of the date of commencement of deliveries under such rate schedule making reference in your communication to the rate schedule as designated above.

44

In addition, please advise the Commission as to whether you would accept permanent certificate authorization under the condition specified in (1) above. Such acceptance may permit disposition of the subject application under the abridged hearing procedure provided no protests or petitions to intervene in opposition to the application are filed.

This authorization and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require. Furthermore, once service is commenced under this author-

ization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. GUTRIDE
Secretary

Enclosure No. 90845
cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
WC:mpg
3-10-61

45

(Docketed April 4, 1961)

WESTERN UNION

DD166 D LLM126 PD AR FAX DALLAS TEX 4 159P CST
JOSEPH H GUTRIDE, SECRETARY
FEDERAL POWER COMMISSION WASHDC

BY LETTER DATED MARCH 17, 1961, TEMPORARY AUTHORITY WAS ISSUED UNDER DOCKET NO. CI61-1221 TO H L HUNT, OPERATOR, ET AL., CONDITIONED UPON THE COMPLIANCE OF SEVERAL MATTERS WITHIN 20 DAYS FROM MARCH 17, 1961. RESPECTFULLY REQUEST AN EXTENSION OF THE 20-DAY PERIOD TO 30 DAYS

H L HUNT BY ROBERT W HENDERSON

1961 APR 4 PM 3 46
FAX

17 1961 CI61-1221 20 17 1961 20- 30.

(46)

46

(Docketed April 5, 1961)

mcx GOVT COLLECT

H. L. Hunt, 700 Merchantile Bank Building, Dallas 1, Texas

Attn: Robert W. Henderson, Attorney

Reuretel April 4. Extension hereby granted to H. L. Hunt, Operator, et al, to and including April 13, 1961 within which to comply with conditions of Commission's letter of March 17, 1961 in Docket No. CI61-1221.

Joseph H. Gutride Secretary Federal Power Commission

SEC:MJF:ls H. L. Hunt, Operator, et al., Docket No. CI61-1221 4/5/61

cc:
Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

cc:
RGC
OGC

48

(Docketed April 13, 1961)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1221

In the Matter of:
H. L. HUNT, Operator, *et al.*

Application for Rehearing

COMES NOW H. L. HUNT, hereinafter referred to as "Petitioner", pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being an aggrieved party, and applies for rehearing and reconsideration of the Commission's Letter Order of March 17, 1961, in the above-captioned proceeding.

I

PRELIMINARY STATEMENT

Petitioner on February 15, 1961, filed its Application for a Certificate of Public Convenience and Necessity, together with a request for temporary authority to commence service immediately. The filing covered Petitioner's interest, as well as the interests of other co-owners, in the H. L. Hunt-Alvin Gas Unit No. 6, Alvin City Field, Brazoria County, Texas. One well is located on the Unit, which contains 265 acres, and said Unit joins on the South the H. L. Hunt-Alvin

49

Gas Unit No. 2, on which there is one well, and joins on the West the H. L. Hunt-Alvin Gas Unit No. 1, on which there are two wells.

In response to Petitioner's request for temporary authorization, this Commission issued its Letter Order of March 17, 1961, which designated Petitioner's contract of December 15, 1960, with Natural Gas Pipeline Company of America as "H. L. Hunt, (Operator) *et al.* FPC Gas Rate Schedule No. 34", and granted temporary authority subject to the following conditions:

"(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

"(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

"(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof."

By telegram dated April 4, 1961, Petitioner requested an extension of the twenty-day period to thirty days. An extension to and including April 13, 1961, was granted by Commission telegram dated April 5, 1961.

II

Assignment of Errors and Reasons in Support Thereof

A. *The Commission Erred since It Has Abused Its Discretion in Issuing Temporary Authorization with the 18¢ Price Condition Because Such Action Is Unreasonable, Arbitrary, Capricious and Discriminatory As to Petitioner.*

Exhibit "A-1" of Petitioner's Application is a plat showing the four gas units in the Alvin City and the Alvin, South Fields, Brazoria County, Texas. Said plat discloses

that this Commission has permanently certificated gas sales at the initial price of 20¢ per MCF at 14.65 psia from three of the units, on which four wells are located. This Commission in its Opinion No. 321 issued May 22, 1959, In the Matters of *Trunkline Gas Company, et al.*, Docket Nos. G-15394, *et al.*, (21 FPC 704) permanently certificated sales by Phillips Petroleum Company to Trunkline Gas Company at an initial price of 20¢ per MCF insofar as Phillips Petroleum Company's interest is concerned in the H. L. Hunt-Alvin Gas Unit No. 2, which Unit adjoins on the north the gas unit which is the subject of the Commission's price-condition letter of March 17, 1961.

In the *Trunkline* Opinion this Commission held:

> "The record contains uncontradicted testimony that the current competitive level of prices in Brazoria and Galveston Counties is 20 cents per Mcf, and that the demand for gas for intrastate uses in this highly industrialized area at this price is so great that Trunkline would not be able to buy any significant reserve at lower prices." (21 FPC 718)

51

This Commission further held:

> "The field price evidence in this proceeding thus indicates a pattern of prevailing prices for the Texas Gulf Coast area in the range of 17.5 to 21.5 cents per Mcf, and within this range the price of 19.5 cents per Mcf appears to predominate. If we were to rely upon this evidence alone, we would be inclined to condition the initial price for the proposed Texas sales at 19.5 cents per Mcf. However, there are other considerations here which lead us to conclude that these sales should be certificated at the contract price of 20 cents per Mcf." (21 FPC 718, 719)

In certificating the proposed sales of Trunkline at the initial contract price of 20¢ per MCF, instead of 19.5 cents, the Commission did take into consideration the firm contract price for a period of ten years. In this proceeding the question is not: "What initial price should be *permanently* certificated as being required by the future and present public convenience and necessity?" The issue here is whether the 20¢ initial price set forth in the contract is against the public interest during the period of time sales are made under temporary authority and before this Commission has the opportunity to examine a complete record. Temporary authorization under Section 7(c) of the Act should be for only a limited time so as to give the Commission an opportunity to set a hearing and develop a record upon which to issue a permanent certificate of public convenience and necessity. This Commission should not be concerned, at this time, in summarily issuing a temporary authorization, as to whether the proposed

52

initial price is firm for ten years or five years because this Commission will have ample opportunity long before any future escalation becomes operative to examine the proposed initial price at the hearing which determines whether a permanent certificate of public convenience and necessity should be issued. By granting authority to Phillips Petroleum Company to sell gas at an initial price of 20¢ per MCF and then to grant Petitioner authority to sell gas at 18¢ per MCF in the same field, on properties which are adjoining, is to discriminate against Petitioner. Such action is arbitrary, capricious and unreasonable and is an abuse of the Commission's discretion.

Assuming *arguendo* that a price condition of 19.5 cents was proper in May of 1959, based upon competitive field prices (which the Commission stated would have been the

result if it hadn't been for the firm price provision for ten years), an initial price of 20¢ per MCF is certainly proper in 1961, based upon the general increase in the cost of doing business. Petitioner in December, 1960, granted all of his employees a five (5%) per cent wage increase at the same time the oil and gas industry granted such increases. The Commission can certainly take knowledge of the general increase in the cost of doing business over the past two years when considering an approximate two and one-half (2½%) per cent increase in the price of gas and especially when the gas industry's labor cost has increased by five (5%) per cent.

53

On July 1, 1960, this Commission entered its Order in *Peoples Gulf Coast Natural Gas Company, et al.*, Docket Nos. G-19086, *et al.*, (24 FPC 1), which issued a permanent certificate of public convenience and necessity to this Petitioner to makes sales of natural gas from the same field and the same reservoirs, to the same pipeline purchaser at an initial price of 20¢ per MCF at 14.65 psia. The issuance of such order was after hearings had been held from April 11, to April 29, 1960, and from May 17, to May 20, 1960. A complete record was developed and this Commission approved the motion which was filed to waive the intermediate-decision procedure and heard oral argument on June 16, 1960. The paramount issue in that proceeding insofar as Petitioner was concerned was stated to be:

> "The issues which are presented in these proceedings are . . . (4) whether the independent producers have demonstrated that the public convenience and necessity require the sale of natural gas by them and, if so, at what initial price such sales have been justified." (24 FPC 2)

Even though the Commission required a modification of the escalation provisions, it held that the proposed price of 20¢ per MCF at 14.65 psia was required by the public convenience and necessity.

The Commission's certification of July 1, 1960, covered Petitioner's Gas Sales Contract of May 15, 1959, and granted Petitioner the authority to sell gas at 20¢ per MCF

54

under Docket No. G-19116, from four wells located on three units in the same field in which Petitioner now proposes to sell gas from an additional well. The only reason the fourth unit, which contains the fifth well in the field, was not included under the contract of May 15, 1959, was because the well had not been drilled and completed at that time. If the well had been in existence, it would have been included under the contract of May 15, 1959, and this Petitioner would have had certificate approval to commence sales to Natural Gas Pipeline Company of America at the proposed initial 20¢ per MCF price. There can be no valid reason to discriminate against Petitioner solely by reason of the fact that a well was not drilled until a later date.

In Opinion No. 310 issued April 4, 1958, In the Matters of *Pan American Petroleum Corporation, et al.*, Docket Nos. G-8549, *et al.*, (19 FPC 463), this Commission has under consideration rates which were suspended under Section 4(e) of the Act. In that Opinion this Commission recognized the inequities of discrimination when it stated:

> "Finally, considering all of the circumstances in this case including, *inter alia*, that the evidence shows this proposed price of 7.6¢ at 14.65 psia to be approximately 25% less than the generally prevailing field

prices in this area at the time in question, that we have already approved on three separate occasions a 10¢ rate for sales of gas to Cities Service from fields in nearby counties, 17 in which cost evidence was submitted and considered by

55

the Commission, the fact that the proposed increase is very modest and that there is substantial evidence from which it can logically be concluded that the costs of operating a gas field and producing gas were increasing during the five-year period from 1951 to 1956 covered by this contract, and that we have been allowing higher rates to go into effect without suspension and with no more justification than has been shown here, we conclude that it would be grossly inequitable to deny the proposed increase in rates." (19 FPC 472)

"We have permitted numerous increases in this area to what we have felt was the prevailing field price price of 10¢. In no other field in the State of Oklahoma have we suspended an increase of a proposed producer rate as low as 7.6¢ per Mcf at 14.65 psia. The suspension in this case can be explained by the fact that the original suspension occurred shortly after the *Phillips'* decision 24 when our data on field prices were incomplete and our experience on these matters was limited. For us now to require further proceedings would amount to undue discrimination on our part against these rate proponents." (19 FPC 474)

In Opinion No. 340 issued January 27, 1961, In the Matter of *United Carbon Company, et al.*, Docket Nos. G-9572, *et al.*, (FPC) this Commission recognized

that it was not in the public interest to have two different prices in the same field for sales to the same pipeline purchaser. The language of the Commission is as follows:

> "Since the cost evidence supports Columbian Fuel's rate of 26 cents per Mcf to United Fuel, for sales of gas from eastern Kentucky, United Carbon should not be required to charge a lower rate for similar sales to the same customers from the same area. Any such difference, in our opinion, would tend to discourage production of gas by United Carbon and would not be in the public interest." (Page 11 of mimeographed Opinion)

56

This Commission has heretofore indicated that a policy of fairness and equality to all parties should be adhered to in the application of its powers under the Act. The intention to follow this principle was expressed in the *Reef Fields* Case, 19 FPC 351. There this Commission stated:

> "... we conclude now that it would be inequitable, unfair, and unduly discriminatory to continue the suspension of the rate increase sought. *Mindful of our responsibility to treat those similarly situated with equality consonant in the premises, we think it is proper and in the public interest that we, upon our own motion vacate the suspension, accept the rate change for filing, and terminate this proceeding.*"

This Commission's Order of March 17, 1961, was indeed shocking since it reflected action on the part of this Commission which deviated from the Commission's previously stated policy of fairness and equality. Any procedure etsablished by this Commission which adopts discriminatory practices is violative of the purpose and spirit of the Act and amounts to an abuse of administrative discretion.

To discriminate against Petitioner by requiring that the proposed initial price be reduced from 20¢ per MCF to 18¢ per MCF where this Commission has permanently

57

certificated a 20¢ per MCF price after a full hearing involving the same producer seller, the same pipeline purchased, the same field and the same gas reservoirs, and where all such facts have already been considered by this Commission, is unreasonable and is an abuse of discretion on the part of this Commission.

B. *The Commission Erred since Its Action Denies Petitioner Due Process of Law*

In this proceeding the Commission is concerned with the same producer seller, the same pipeline purchaser, the same field and the same gas reservoirs which were involved in the previous hearing under Docket Nos. G-19086, *et al.*, which required some twenty hearing days. To force Petitioner to incur the additional time and expense to retry the same facts considered by this Commission less than a year ago is to deny Petitioner due process of law.

Consideration also should be given to the various legal ramifications if Petitioner's initial contract price is set at a lower rate than Petitioner's other contract prices which previously have been certificated by this Commission. Petitioner owns numerous oil and gas leases in the Alvin Gas Unit No. 6 which contain binding contractual obligations to pay royalties on the basis of the market value of the gas at the wellhead. An example of such an oil and gas lease provision is as follows:

58

"... The royalties to be paid by Lessee are ... gas, including casinghead gas, or other gaseous substances,

> produced from said land and sold or used off of the premises or for the extraction of gasoline or other products therefrom, the *market value* at the well of 1/8 of the gas so sold or used, provided that on gas sold at the wells, the royalty shall be 1/8 of the amount realized from such sale . . ." (Emphasis added)

Thus, unless Petitioner is granted temporary authority to sell gas at the same price previously certificated by this Commission, Petitioner could easily find itself on the horns of an unenviable dilemma. Petitioner may find itself in the position of having to determine royalty on the basis of the market value in the field even though it is selling gas at a lesser price as a result of the discrimination being forced upon Petitioner by this Commission. Such discrimination would deprive Petitioner of due process afforded by the Constitution.

C. *Assuming Arguendo That the Commission Has Not Abused Its Discretion under Section A Above, the Commission Erred in Imposing the Price Condition since It overturns Prices Agreed Upon by the Parties and Subjects Petitioner to Loss Which Never Can Be Recouped thereby Depriving It of Property without Due Process of Law.*

Section 7(e) of the Natural Gas Act provides:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

In *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 U.S. 332 (1956) the Supreme Court stated:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 U.S. 338)

". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 U.S. 343)

In *Atlantic Refining Company, et al.*, v. *Public Service Commission of the State of New York, et al.*, 79 Sup. Ct. 1246, 360 U.S. 378 (1959) (The CATCO Decision), the Supreme Court stated:

"What we do say is that the inordinate delay presently existing in the processing of Section 5 proceedings requires a most careful scrutiny and responsible reaction to *initial* price proposals of producers under Section 7." (Emphasis added)

The Court further held:

"In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.* Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate."

60

"And Section 7 is given only that scope necessary for 'a single statutory scheme under which *all rates are established initially by the natural gas companies*, by contract or otherwise, and all rates are subject to being modified by the Commission . . .' *United Gas Pipeline Company* v. *Mobile Gas Service Corp., supra*, at 341." (Emphasis added)

Under these two decisions it is clear that the Supreme Court has not construed Section 7(e) of the Act in such manner as to grant to this Commission the power and authority to attach conditions to permanent certificates which would subject the producer seller to permanent loss of revenues which never can be recouped. The Court did have reference to permanent certificates issued after hearing where all interested parties had ample opportunity to present the facts and circumstances justifying the price proposals and in negating the necessity of price conditions. The language used certainly applies even to a greater extent to the issuance of temporary authority under Section 7(c) of the Act since interested persons have not been afforded an opportunity to present such facts and circumstances which would justify their initial price proposals (*Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F. 2d 404, (10th Cir., 1959). Especially in those situations where hearings have not been afforded the Applicant, this Commission should not summarily impose a price condition which would subject the Applicant to permanent loss of revenues which

61

never can be recouped at any future time regardless of how strong its factual presentation of justification might be.

In the CATCO Decision the Supreme Court emphasized:

> "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."
>
> "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the five-month suspension provision of Section 4 and the showing of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases."

The reason that the Supreme Court held that this Commission has the power and authority to attach price conditions to the *initial* price was due to the prospective effect of Section 5 proceedings. The quotation above is a definite recognition by the Court that the consumer is protected under Section 4 of the Act. Under the procedure followed by this Commission in this proceeding, no protection whatsoever has been afforded Petitioner. In striving to protect the consumer interest this

Commission has completely ignored any rights which Petitioner might have.

The Act should not be so construed as to give protection to the consumer only and subject those persons subject to the Act to permanent loss which never can be recouped. This Commission in exercising its power to attach reasonable terms and conditions under Section 7(e) of the Act to temporary authorizations issued under Section 7(c) of the Act should not summarily subject Petitioner to permanent loss of revenues which never can be recouped. It has the power to protect Petitioner from permanent loss of revenues and at the same time protect the consumer. In CATCO, the Court in speaking of attaching a condition to the initial price stated:

> ". . . it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the *price fixed by the parties* is being determined under other sections of the Act." (Emphasis added)

The price fixed by the parties in this proceeding is 20¢ per MCF at 14.65 psia. The price condition required by this Commission is 18¢ per MCF. Under these circumstances, how is the justness and reasonableness of the 20¢ price fixed by the parties going to be determined under other sections of the Act? The only method by which the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act is by attaching a price condition of 18¢ for the first twenty-four hours of deliveries, with the right given to the producer seller

63

to increase such price to 20¢ in accordance with Section 4(d) of the Act. Under this procedure the Commission can exercise its powers under Section 4(e) and determine the justness and reasonableness of the price fixed by the

parties and not subject Petitioner to the permanent loss of revenues which never can be recouped under the type of price condition attached in the Commission's letter of March 17, 1961. The action taken by this Commission violates Petitioner's rights of due process guaranteed by the Constitution since it will subject Petitioner to loss of revenues illegally which never can be recouped.

D. *Commission's Order of March 17, 1961, Is Invalid since It Is in Violation of the Federal Administrative Procedure Act.*

Section 6(d) of the Federal Administrative Procedure Act, 5 USCA § 1005(d), provides:

> "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedure or other grounds."

This Subsection is applicable to any agency proceeding, including the summary order of March 17, 1961. Since the Order fails to disclose the grounds or reasons for the denial in part of Petitioner's Application for temporary authorization, said Order is in direct violation of the Federal Administrative Procedure Act and denies to Petitioner the grounds and reasons

the Commission may have said in entering such Order. To summarily deny Petitioner's request without any statement as to the reasons or grounds for such denial is also violative of the procedural due process rights of Petitioner.

Wherefore, for the foregoing reasons, Petitioner requests that this Commission grant this Application for

Rehearing of the Commission's Order issued March 17, 1961, in the captioned docket; and that upon such rehearing, the Commission set aside and vacate said order insofar as it attaches conditions to the granting of the temporary authorization to commence sales immediately.

Respectfully submitted,

ROBERT W. HENDERSON
THOMAS G. CROUCH
700 Mercantile Bank Building
Dallas 1, Texas

ROBERT E. MAY
May, Shannon & Morley
1700 "K" Street, N. W.
Washington 6, D. C.

By ROBERT W. HENDERSON
Robert W. Henderson

Attorneys for:
H. L. HUNT

67

Docketed May 11, 1961

Docket No. CI61-1221

H. L. HUNT, (Operator), *et al.*

H. L. Hunt
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

This is with reference to your tender, on April 13, 1961, of a petition for reconsideration of the temporary author-

ization granted H. L. Hunt (Operator) *et al.*, by letter Order of March 17, 1961, in the captioned docket, to commence sales of natural gas in interstate commerce to Natural Gas Pipeline Company of America from the Alvin City Field, Brazoria County Texas.

After reconsideration of all known facts and circumstances involved in the aforementioned sale, your petition to eliminate the conditions attached to such temporary authorization is hereby denied.

By direction of the Commission.

J. H. GUTRIDE
Secretary

cc: May, Shannon, & Morley
1700 K Street, N. W.
Washington 6, D. C.
Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
EHK:epm
5-2-61

(Docketed May 31, 1961)

Docket No. CI61-1221
H. L. HUNT, Operator, *et al.*

Docket No. CI61-1282
H. L. HUNT

H. L. Hunt
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Robert W. Henderson

Gentlemen:

This is with reference to your submittals of April 11, 1961 and May 5, 1961 of your acceptances with certain reservations of temporary authorizations issued March 17, 1961 in Docket No. CI61-1221 and April 7, 1961 in Docket No. CI61-1282. Also submitted, in purported compliance with the attached rate conditions, were copies of amendatory agreements dated April 3, and April 19, 1961 of the basic contracts specifying an initial rate of 18.0¢ per Mcf, as required, but further providing for a rate of 20.0¢ per Mcf thirty days from the date of initial delivery.

The latter provision is in conflict with the intent and purpose of the rate condition attached to the temporary authorizations and your acceptances and purported compliances are hereby rejected.

Conditions of a temporary authorization should be specifically complied with and the compliance be without revised counter price adjustments which conflict with the purpose of the conditions. In order to clarify the intent of the temporary authorizations issued March 17, 1961 and April 7, 1961 in the above dockets, the language of condition (1) thereto is modified to read as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per Mcf at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established.

Further, the proposed related rate increases under your FPC Gas Rate Schedule Nos. 34 and 35, based upon the rejected agreements of April 3, and April 19, 1961 are hereby rejected and returned herewith.

69

Your petition for reconsideration of the aforementioned temporary authorization in Docket No. CI61-1282 and for removal of the conditions attached thereto has been considered with all the known facts and circumstances involved and such petition is hereby denied.

Service having commenced under the authorizations, such service may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. Gutride
Secretary

Enclosure No. 97674
cc: Natural Gas Pipeline Company
122 South Michigan Avenue
Chicago 3, Illinois

May, Shannon & Morley
1700 K Street, N. W.
Washington 6, D. C.

EMM:epm
5-24-61

71

(Docketed June 26, 1961)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1221

In the Matter of:

H. L. HUNT (Operator), *et al.*

Application for Rehearing and Reconsideration

COMES NOW H. L. HUNT, (hereinafter referred to as Petitioner) pursuant to the provisions of Section 19(a) of the Natural Gas Act, Section 1.34 of the Commission's Rules of Practice and Procedure, and files this Application for Rehearing and Reconsideration of the Commission's Letter Order issued 31, 1961, in the captioned docket. In support of this Application, Petitioner would show as follows:

I.

STATUS OF PROCEEDING

On February 15, 1961, Petitioner filed an Application for a Certificate of Public Convenience and Necessity requesting authority to make a sale of gas to Natural Gas Pipeline Company of America (herein referred to as Natural) in accordance with that certain Gas Sales Contract dated

72

December 15, 1960, by and between Petitioner and Natural. An emergency existed by reason of an economic hardship and Petitioner requested temporary authority to commence the sale proposed immediately.

In response to said Certificate Application and request for temporary authority, the Commission issued its Letter Order dated March 17, 1961, which designated the aforementioned Gas Sales Contract as Petitioner's FPC Gas Rate Schedule No. 34. Said Letter also granted temporary authority to commence immediately the sale proposed subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per MCF at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

An April 11, 1961, Petitioner filed its acceptance of such temporary authorization reserving its rights to take the appropriate steps necessary to remove the aforementioned conditions and to seek permanent certificate authorization in accordance with the terms set forth in its original Certificate Application. In compliance with the condition of

said Letter Order, Petitioner submitted an Amendment to Gas Sales Contract dated April 3, 1961, between Petitioner and Natural. This contractual amendment complied with the Commission's condition by reducing the initial price to 18¢. It also provided for an escalation in price to 20¢ per MCF, 30 days after the commencement of deliveries.

Subsequently, Petitioner filed an Application for Rehearing wherein the Commission was requested to remove the conditions attached to the temporary authorization issued herein, and a Notice of Change in Rate which was

based upon the escalation provision of the said Amendment dated April 3, 1961.

By Letter Order issued May 31, 1961, the Commission denied the aforementioned Application for Rehearing, rejected Petitioner's acceptance of the temporary authority, amended the conditions of its Letter Order issued March 17, 1961,[1] and rejected Petitioner's Notice of Change filing based on the escalation provision of the Amendment dated April 3, 1961.

74

II.

Basis of Application

It is patently clear that the Commission erred in each action taken by its letter order issued May 31, 1961—(1) the denial of Petitioner's Application for Rehearing in Docket No. CI61-1221, (2) rejection of Petitioner's acceptance of temporary authority, (3) imposition of a condition prohibiting a rate change for duration of temporary authorization, and (4) rejection of Petitioner's Notice of Change filing. It is Petitioner's position that the Commission, in each instance, exceeded its authority under the Natural Gas Act, acted contrary to the public interest, deprived Petitioner of valuable property rights without due process of law, acted in a most unreasonable, arbitrary, and capricious manner, and grossly abused its administrative discretion. Thus, Petitioner would request that the Commission reconsider and reverse each of these actions.

---

1 "The language of condition (1) issued in the Commission's Letter Order of March 17, 1961, is modified to read as follows:

(1) That the total initial price under this authorization shall not exceed 13¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

With regard to the Commission's action in denying Petitioner's Application for Rehearing, Petitioner would recall to the Commission's attention the arguments set forth in Petitioner's Application for Rehearing. Such arguments concisely and cogently establish the error of the Commission's

action in issuing the March 17, 1961, order. Thus, those arguments will not be repeated again in this Application. This Application will direct itself toward the remaining errors which were perpetrated by said Letter Order of May 31, 1961:

1. Rejection of Petitioner's Acceptance of Temporary Authority.

2. Imposition of a Condition prohibiting a rate change for duration of Temporary Authority.

3. Rejection of Petitioner's Notice of Change filing.

III.

Argument

A. *Rejection of Acceptance of Temporary Authority*

There is no basis for the Commission's rejection of Petitioner's acceptance of temporary authority. The acceptance specifically complies with the conditions set forth in the Commission's Letter Order dated March 17, 1961. The initial price was reduced to 18¢ per MCF in accordance with Condition No. 1 of said Order. Granted, the Amendment, whereby the initial price was reduced, also provides for an additional escalation in price. However, the propriety of a subsequent price is not in issue in a Certificate proceeding under Section 7 of the Natural Gas Act. Sec-

tion 4 of the Natural Gas Act affords the Commission ample opportunity

76

to question the just and reasonableness of any subsequent increase in price. Thus, the only price which requires any consideration by the Commission in the proceeding instituted in Docket No. CI61-1221, is the initial price. The Petitioner did exactly as the Commission requested. The initial price was reduced to 18¢ per MCF. Therefore, the Petitioner's acceptance of the temporary authority should not have been rejected. The Commission, in its Letter Order issued May 31, 1961, recognizes that the Petitioner complied with the Commission's conditions. Otherwise, there would have been no reason to amend the language of Condition No. 1.

In denying Petitioner's acceptance, the Commission states that the escalation provision of the amendatory agreement is in conflict with the "intent and purpose of the rate condition attached to the temporary authority". In reply, Petitioner would urge that the only valid "intent and purpose" for the issuance of the March 17, 1961, price condition is the protection of the gas consumer from the payment of excessive prices for natural gas pending the determination of a just and reasonable rate. If the price condition was imposed for any other reason, it was improperly imposed and therefore invalid. Petitioner submits that its acceptance is entirely

77

consistent with the statutory intent and purpose upon which the imposition of a price condition may be predicated. It affords the consumer all of the protection of Section 4 of the Natural Gas Act and at the same time preserves to Petitioner his statutory right to receive contract prices which are shown to be just and reasonable.

One reason for the Commission's authority to attach conditions to initial price is due to the prospective effect of Section 5 proceedings. Note the Supreme Court's explicit recognition in *Atlantic Refining Company, et al.* v. *Public Service Commission of the State of New York, et al.*, 70 Sup. Ct. 1246, 360 US 378 (1959) (The CATCO decision), that the consumer is protected under Section 4 of the Natural Gas Act.

> "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."
>
> "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by

> contract, *United Gas Pipeline Company vs. Mobile Gas Service Corp.*, 350 US 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the five-month suspension provision of Section 4 and the showing of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases."

The Petitioner in complying with the Commission's original price condition executed an Agreement (which was approved by the pipeline purchaser) that would protect his

right to receive his original contract price but at the same time would afford the gas consumer the refund protection of Section 4 of the Natural Gas Act. The Commission, however, has arbitrary rejected such a proposal and attempted to impose a condition which it does not have the power to impose.

B. *Imposition of a Condition Prohibiting a Rate Change For Duration of Temporary Authorization*

The Commission in its Order of May 31, 1961, amended its original price conditions regarding the 18¢ initial price to provide as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established.

79

Petitioner submits that such an amendment merely complicates error with error. The Commission cannot, under the terms of Section 7(e) of the Natural Gas Act, arbitrarily impose price conditions for the duration of temporary authorizations. Its attempt in the present instance is therefore a flagrant abuse of its administrative discretion in the issuance of Certificate of Public Convenience and Necessity.

Section 7(e) of the Natural Gas Act provides as follows:

"The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The public convenience and necessity surely does not require any action by the Commission which denies Petitioner or any other producer of natural gas the right to establish, collect, and justify, just and reasonable prices which have been agreed upon by Petitioner and its pipeline purchaser. Such action is a deprivation of property without due process of law. It prejudges all future increases without an opportunity to be heard and is arbitrary, capricious, and contrary to the public interest.

The power to attach conditions as broad as the one here imposed would be tantamount to the power to set rates.

80

Petitioner submits that the imposition of the proposed price condition is merely a substitution of an arbitrarily determined rate for one agreed upon by contracting parties. The Supreme Court has made clear in this regard that the Commission's function is that of reviewing rates rather than setting rates. This is clearly illustrated in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 U.S. 332 (1956):

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 US 338)
>
> ". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 US 343)

Also note the Supreme Court's language in *Atlantic Refining Company, et al.*, v. *Public Service Commission of the State of New York, et al.*, 79 Sup. Ct. 1246, 360 U.S. 378 (1959) (The CATCO decision):

> "In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.*"

81

Thus, the Supreme Court has not construed Section 7(e) of the Natural Gas Act so broad as to grant the power and authority to attach conditions which will change the pricing structure agreed upon by the parties. The Commission cannot now presume to assume such authority under the guise of conditioning initial rates.

C. *Rejection of Petitioner's Notice of Change Filing*

The Natural Gas Act does not give the Commission the authority to reject a Notice of Change which is in compliance with all the statutory requirements and which is predicated upon a contractual agreement by the parties to the sale. Certainly Section 4 of the Act gives the Commission the power to suspend an increase in price which may be unjust and unreasonable and to hold a hearing to determine whether such increase is justified, but under no circumstances may the Commission flatly reject a Notice of Change filing which complies with all the statutory filing requirements. The statute leaves no room for administrative discretion. Thus, when Petitioner's Notice of Change was filed on May 8, 1961, the Commission had two alternatives, either accept or suspend said increase in rate. The

only possible reason that the Commission could have had for returning such filing was its

82

failure to comply with the Commission's specified rules and regulations. In this instance, this was not the basis for the Commission's rejection of Petitioner's filing. Thus, the Commission's arbitrary rejection of said filing exceeds its statutory authority.

Petitioner would remind the Commission that it is entitled to the increase in price by contract whether or not the Commission accepts the Amendment dated April 3, 1961. Petitioner's Gas Sales Contract dated December 15, 1960, with its pipeline purchaser provides for an initial price identical to that proposed in the subject Notice of Change. Furthermore, any conditioning action by the Commission cannot abrogate this contractual right. The mere fact that the 20¢ price was conditioned to 18¢ does not alter the contractural obligations existing between the Petitioner and its pipeline purchaser. As a result of these contractural obligations, Petitioner has the right, under Section 4 of the Natural Gas Act, to file for an increase in price which is consistent with such contractual obligations, and to justify, if required to do so, such proposed increase. Any doubt as to this point was resolved by *Texaco, Inc.*, v. *Federal Power Commission*, —— Fed. 2nd ——, (5th Cir., 1961).

83

Note the Court's language when confronted with the very same question which is posed herein:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying

with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here. El Paso has voluntarily agreed by contract to pay 20 cents initially for a period of five years. The fact that the Commission has required its producers to deliver to it at 17.7 cents does not, it seems to us, amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny to the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to. It does not follow that if producers are thereafter able to make a record in a section 4(e) proceeding that would warrant the Commission's finding 20 cents to be just and reasonable rate that the Commission would be powerless to make such a finding and approve such rate because of any contractural relations between the producers and El Paso."

Petitioner submits that the Commission's action in rejecting the subject Notice of Change is directly contra to the foregoing language. If not, why not? If the Commission's action is consistent with the Fifth Circuit in this regard, then the foregoing language means absolutely nothing. Needless to say, the honorable court was not speaking through

84

its hat. Its pronouncement was intended to be authoritative and followed.

Of course, Petitioner's filing in this instance is much stronger than the sales which were before the Court in *Texaco, Inc.* v. *Federal Power Commission, supra.* There

the Court proposed a filing under Section 4 which was based upon an initial contractual agreement which had been conditioned. Here the Petitioner's filing is predicated upon a subsequent agreement wherein the pipeline purchaser agrees to pay as an increase in price, a rate which is consistent with the original contractual agreement that was erroneously conditioned by the Commission. Thus, Petitioner's filing in addition to having the force of the original contractual agreement has the added strength of a subsequent agreement to support Petitioner's filing. The existence of such new agreement makes more clear the arbitrary nature of the Commission's rejection of Petitioner's Notice of Change filing.

IV.

Conclusion

In summary, it is clear that the Commission has stepped beyond the limits of its statutory authority. The seriousness of such an arbitrary and capricious departure from the

Natural Gas Act is the confiscating effect it has upon Petitioner's property rights. In every particular, the Commission's action of May 31, 1961, reeks with confiscation! Summarily, without due process, the Commission has deprived Petitioner of a portion of the economic value of its gas. As may be noted in this case, from the original billing statement and comparative statement attached to the Notice of Change filing, such value amounts to a large sum of money. The tragedy of such action is in fact that it could have been avoided. As herein suggested, the Commission could have given the consumer the same protection he now has without such a confiscatory disregard of Petitioner's property rights. Unless the Commission re-

verses its action, the Petitioner will be forever deprived of the revenues to which it is contractually entitled.

WHEREFORE, for the reasons set forth in Petitioner's original Application for Rehearing and Reconsideration filed in the captioned docket, Petitioner requests that the Commission reconsider the issuance of its Letter Order dated March 17, 1961, and upon such reconsideration, issue temporary authorization without conditions, and rescind its Letter Order of May 31, 1961; and, in the alternative Petitioner requests

86

for the reasons set forth hereinabove, that the Commission reconsider the issuance of its Letter Order dated May 31, 1961, and upon such reconsideration accept the Petitioner's acceptance of temporary authorization, delete the amendment to the price condition set forth in the Letter Order of March 17, 1961, and accept for filing, Petitioner's aforementioned Notice of Change in Rate; and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

H. L. HUNT
By THOMAS G. CROUCH
Thomas G. Crouch,
Attorney

89

(Docketed June 30, 1961)

H. L. HUNT
700 Mercantile Bank Bldg.
Dallas 1, Texas

June 29, 1961

Federal Power Commission
441 "G" Street, N.W.
Washington, D. C.

Attention: Mr. Joseph H. Gutride, Secretary

Gentlemen:

This is with reference to your rejection by Letter Order dated May 31, 1961, of a Notice of Change in H. L. Hunt's FPC Gas Rate Schedule No. 34. This Rate Schedule covers a sale of gas to Natural Gas Pipeline Company of America, from the Alvin City Field, Brazoria County, Texas.

On June 26, 1961, H. L. Hunt filed an Application for Rehearing and Reconsideration of the Letter Order issued May 31, 1961. In connection with the requests therein, Petitioner resubmits the following for filing:

1) Notice of Change in Petitioner's FPC Gas Rate Schedule No. 34.

2) Petitioner's Acceptance of Temporary Authority.

For reasons set forth in said Application for Rehearing and Reconsideration, H. L. Hunt is confident that the Commission will accept same for filing.

(89)

Please stamp one conformed copy of each filing "Received" and return to us in the enclosed stamped addressed envelope.

Yours very truly,

H. L. HUNT

By THOMAS G. CROUCH

Thomas G. Crouch,

Attorney

TGC/ca

90.

(Docketed April 11, 1961)

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL POWER COMMISSION

WASHINGTON, D. C.

Docket No. CI61-1221

In the Matter of:

H. L. HUNT, Operator, *et al.*

Acceptance by H. L. Hunt of Temporary Authority With Reservations

H. L. HUNT, Applicant, filed in the captioned docket an Application for a Certificate of Public Convenience and Necessity requesting authority to sell natural gas to Natural Gas Pipeline Company of America (Natural). The Application also contained a request for temporary authority to commence service immediately. By letter issued March 17, 1961, the Commission granted temporary authority to commence immediately the sale upon the following conditions:

1. That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

2. The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

3. Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

91

Applicant is being severely drained by other producers in the field selling gas to other pipeline purchasers from wells completed in the same reservoirs as Applicant's well which is the subject of its Application; therefore, in view of this severe drainage, Applicant is constrained to accept, and does hereby accept the temporary authority for the sale proposed in accordance with the conditions set forth above; provided, however, that this acceptance is made without prejudice to and with the express reservations of the following rights of Applicant:

1. The rate schedule shall be temporarily amended in accordance with the instrument attached hereto as Exhibit "A" which shall be effective only so long as deliveries are made under the temporary authorization of March 17, 1961, with the same price condition therein contained.

2. Since Applicant does not believe the conditions attached to the temporary authorization are proper or reasonable, Applicant reserves all its rights to take all necessary and appropriate steps to obtain their removal by filing an Application for Rehearing and, if necessary, a Petition for Review.

3. Deliveries to Natural will be without prejudice to Applicant's rights to seek removal of the conditions, to seek an unconditional permanent certificate of 20¢ per MCF at 14.65 psia and to seek increases in the

price in accordance with the rate schedule, as amended by the instrument attached as Exhibit "A".

EXECUTED this 3rd day of April, 1961.

H. L. HUNT
H. L. Hunt

92

SUBSCRIBED AND SWORN To before me, a Notary Public, this 3rd day of April, 1961.

JUDY D. HOLT
Notary Public in and for
Dallas County, Texas

My Commission expires June 1, 1961.

(Seal)

93

EXHIBIT A

AMENDMENT DATED AS OF
APRIL 3, 1961
TO
GAS SALES CONTRACT
DATED AS OF DECEMBER 15, 1960
ALVIN CITY FIELD, BRAZORIA COUNTY, TEXAS

By this Instrument dated as of April 3, 1961, Natural Gas Pipeline Company of America (Buyer) and H. L. Hunt (Seller), parties to that certain Gas Sales Contract, Alvin City Field, Brazoria County, Texas, dated as of December 15, 1960, in consideration of the mutuality hereof, Do Hereby Covenant And Agree that said Gas Sales Con-

tract shall be temporarily amended in the following particular, to-wit:

In Paragraph 1 of Article Ninth (Price, Billing and Payment), the words:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents;"

are temporarily deleted and in substitution therefor the following words are inserted:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) the price shall be eighteen (18) cents for deliveries during the first thirty (30) days and twenty (20) cents during the remainder of said period;"

This Amendment shall be effective from the date hereof and so long as gas is delivered under the temporary authorization issued by the Federal Power Commission on March 17, 1961, in Docket No. CI61-1221; provided, however, in the event the price condition attached to said temporary authorization is changed,

modified or annulled, this Amendment shall terminate. At the date of termination of this Amendment the words deleted from said Gas Sales Contract by this Amendment shall be reinstated effective as of such date as though this Amendment were never entered into.

(94)

Except as herein amended, all the terms and provisions of said Gas Sales Contract shall remain in full force and effect.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

NATURAL GAS PIPELINE COMPANY OF AMERICA

By M. V. BURLINGAME
M. V. Burlingame
Executive Vice President

H. L. HUNT

By .....

ATTEST:
Assistant Secretary

.....

WITNESS:
JUDY HOLT
CAROLYN ARMSTRONG

95

STATE OF ILLINOIS }
COUNTY OF COOK }

BEFORE ME, the undersigned authority, on this day personally appeared M. V. BURLINGAME, Executive Vice President of NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 7th day of April, 1961.

(illegible)

.....

Notary Public,
Cook County, Illinois
My Commission Expires
February 2, 1963

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared H. L. HUNT, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN under my hand and seal of office this 10th day of April, 1961.

JUDY D. HOLT
Notary Public
in and for Dallas County,
Texas

(96)

96

Dallas, Texas, March 31, 1961

Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago, Illinois

In Account With
H. L. Hunt
700 Mercantile Bank Building
Dallas 1, Texas

Audit No.

REVISED
SAMPLE BILLING

Gas delivered to you from the H. L. Hunt-Alvin Gas Unit No. 6, Brazoria County, Texas, during the month of March, 1961:

36,549 MCF @ 18¢ per MCF $6,578.82

99

(Received June 30 '61)

UNITED STATES OF AMERICA BEFORE THE FEDERAL POWER COMMISSION, WASHINGTON, D. C.

Docket No. CI61-1221

FPC Gas Rate Schedule No. 34

In the Matter of:

H. L. Hunt, Operator, et al.

Supplement to Application for Rehearing and Reconsideration

Comes Now H. L. Hunt (herein referred to as Petitioner) and filed a Supplement to the Application for Rehearing and Reconsideration filed with the Commission

on June 26, 1961, wherein the Commission was requested to reconsider its Letter Order issued May 31, 1961, insofar as said Order rejects for filing Petitioner's tender of an Acceptance of Temporary Authority and a Notice of Change in its FPC Gas Rate Schedule No. 34.

As a Supplement to said Application for Rehearing and Reconsideration, Petitioner submits the following instruments which were the subject of the Commission's Letter Order dated May 31, 1961:

1) Notice of Change in Petitioner's FPC Gas Rate Schedule No. 34.

2) Petitioner's Acceptance of Temporary Authority. Copies of said instruments are attached hereto as Exhibits "A"

100

and "B" respectively, and incorporated herein by reference; the above instruments are submitted for convenience so that the Commission might have before it copies of the rejected filings.

In connection with relief requested by Petitioner's Application for Rehearing and Reconsideration, Petitioner is re-submitting under separate cover the filings which have been rejected. For the reasons set forth in its Application for Rehearing, Petitioner is confident the Commission will accept same for filing.

Petitioner again renews its request that the Commission reconsider the issuance of its Letter Order issued May 31, 1961, and accept for filing, the acceptance of temporary authority and the subject Notice of Change in Rate; and,

Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

H. L. Hunt

By Thomas G. Crouch
Thomas G. Crouch, *Attorney*

101

Received June 30, '61

State of Texas }
County of Dallas }

Thomas G. Crouch, being first duly sworn, deposes and states that he is attorney for H. L. Hunt; that as such Attorney he has signed the foregoing Supplement to Application For Rehearing and Reconsideration for and on behalf of said H. L. Hunt; that he is authorized so to do; that he has read the said document and is familiar with the contents thereof; and the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

Thomas G. Crouch
Thomas G. Crouch

Subscribed and Sworn to Before Me, a Notary Public, this 29th day of June, 1961.

Judy H. Studebaker
Notary Public
in and for Dallas County,
Texas

My Commission expires
June 1, 1963.

(Seal)

EXHIBIT A

(Received May 8, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

In the Matter of:
H. L. HUNT, (Operator), *et al.*

Notice of Change in Rate

H. L. Hunt (Operator), *et al.*, FPC Gas Rate Schedule No. 34, Supplement No. 2

Subject to all of the conditions, limitations and reservations hereinafter set forth, and pursuant to the provisions of Section 154.94 of the Commission's Rules and Regulations, as amended, H. L. Hunt, (Operator), *et al.*, designated as "Seller") hereby files, in triplicate, this Supplement No. 2 to his FPC Gas Rate Schedule No. 34.

In compliance with the provisions of Section 154.94 (e), the following information is submitted with respect to this filing. A statement of reasons, nature and basis of the change proposed herein is set forth in Exhibit "A" attached hereto and incorporated herein by reference.

(i) This change in rate is made on behalf of H. L. Hunt and his co-owners whose gas may be subject to his rate schedule and is intended to be a supplement to his FPC Gas Rate Schedule No. 34. The date on which the change is proposed

to be made effective is May 3, 1961; therefore, it is requested that this supplement be accepted to be effective as of that date and that a waiver of

the thirty-day notice requirement be granted under Section 154.98 of the Commission's Regulations.

(ii) The name of the purchaser is Natural Gas Pipeline Company of America.

(iii) Article Ninth of that certain Gas Sales Contract dated December 15, 1960, as amended April 3, 1961, which comprises the subject Rate Schedule is the contract provision authorizing the change proposed herein. This provision is quoted in full in the Statement of Reasons, Nature and Basis of Change attached hereto as Exhibit "A", to which reference is here made for all purposes.

(iv) Delivery is made under the subject Rate Schedule in the Alvin City Field, Brazoria County, Texas.

(v) The present total effective price on May 2, 1961, is 18¢ per MCF at 14.65 psia.

(vi) There are no deductions from the present price for amortization, dehydration, gathering, treating, etc.

105

(vii) The proposed total price to be effective May 3, 1961, is 20¢ per MCF at 14.65 psia.

(viii) There are no deductions from the proposed price for amortization, dehydration, gathering, treating, etc.

(ix) There is attached hereto as Exhibit "B" a comparative statement of sales made and revenues therefrom by months under the rate schedule effective for the twelve months immediately preceding and for the twelve months immediately succeeding the date when this change is effective.

Estimates are used where actual data is not available. All computations and accounting shown in Exhibit "B" are based on the volume of gas sold from the well or wells, including royalty, attributable to the working interest of Seller.

This filing is made under the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders and without admitting that the Federal Power Commission has jurisdiction over either the undersigned Seller or the subject matter of this filing, and without prejudice to the rights of

the undersigned Seller to contest the validity of said orders, and without prejudice to Seller's rights to contest the jurisdiction of the Commission over the subject matter of this filing.

If the Commission in its discretion suspends the increase in price, it is respectfully requested that the five-month suspension period be waived and that a suspension of one day only be ordered. The reasons for this request are set forth in the attached Exhibit "A".

Please address all communications relating to this filing to the undersigned.

Respectfully submitted,

H. L. Hunt
By Robert W. Henderson
Robert W. Henderson
Attorney

EXHIBIT "A"

STATEMENT OF REASONS, NATURE AND BASIS FOR THE PROPOSED CHANGE

The change in rate proposed herein is supported by and in accordance with the minimum price obligations of that certain Gas Sales Contract dated December 15, 1960, as amended April 3, 1961, between H. L. Hunt and Natural Gas Pipeline Company of America. Article Ninth of said contract, as amended, contains the following provision:

> ". . . for gas delivered during the first four years of the delivery term (and any period prior to its commencement) the price shall be eighteen (18) cents for deliveries during the first thirty (30) days and twenty (20) cents during the remainder of said period;"

The Gas Sales Contract dated December 15, 1960, as originally agreed upon by the parties provided for an initial price of 20¢ per MCF at 14.65 psia. The Contract was filed with the Commission together with an Application for Certificate of Public Convenience and Necessity and Temporary Authority to commence service immediately. On March 17, 1961, under Docket No. CI61-1221, the Commission granted temporary authority subject to the condition that the initial price be reduced to 18¢ per MCF at 14.65 psia. Seller was unwilling to permanently amend the Contract to provide for an 18¢ price during the entire first four-year period. In compliance with the Commission's condition, Seller did amend the Contract to

provide for an 18¢ initial price with an escalation to 20¢ per MCF at 14.65 psia after the first thirty days of deliveries. Deliveries under the temporary authorization

commenced on April 3, 1961; therefore, the contractual increase to 20¢ per MCF is effective May 3, 1961.

For this Commission to attempt to deny Seller the right to increase its initial price to the price level agreed upon by the Seller and the Pipeline Purchaser would amount to an attempt to deny Seller revenues which Seller never could recoup. Any such attempt of the Commission would be to deny Seller due process of law and would overturn prices agreed upon by the parties and subject Seller to loss which never can be recouped, thereby depriving it of property without due process of law. The language of the Court of Appeals for the Fifth Circuit in *Texaco Inc., et al.*, vs. *Federal Power Commission*, Cause No. 18349, decided April 14, 1961, is pertinent. Such language is as follows:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here." (Page 14)

Under these circumstances, the consumer is adequately protected. There is no need for the Commission to

suspend the increase in price for a period of five months. It is Seller's position that the 20¢ price to which the increase is being filed is a just and reasonable rate and is in the public interest.

110

(Received May 8, 1961)

EXHIBIT "B"

COMPARATIVE STATEMENT OF REVENUES AT THE PRESENT RATE AND PROPOSED RATE FOR 12 MONTHS PRIOR AND 12 MONTHS SUBSEQUENT TO MAY 3, 1961

SELLER: H. L. Hunt (FPC Gas Rate Schedule No. 34)
BUYER: Natural Gas Pipeline Company of America
FIELD: Alvin City, Brazoria County Texas

YEAR	MONTH	MCF *	PRESENT RATE PER MCF 18¢	PROPOSED RATE PER MCF 20¢
1960	May	36,549	$ 6,578.82	$ 7,309.80
	June	36,549	6,578.82	7,309.80
	July	36,549	6,578.82	7,309.80
	August	36,549	6,578.82	7,309.80
	September	36,549	6,578.82	7,309.80
	October	36,549	6,578.82	7,309.80
	November	36,549	6,578.82	7,309.80
	December	36,549	6,578.82	7,309.80
1961	January	36,549	6,578.82	7,309.80
	February	36,549	6,578.82	7,309.80
	March	36,549	6,578.82	7,309.80
	April	36,549	6,578.82	7,309.80
12 months prior to May 3, 1961		438,588	$78,945.84	$87,717.60
1961	May	36,549	$ 6,578.82	$ 7,309.80
	June	36,549	6,578.82	7,309.80
	July	36,549	6,578.82	7,309.80
	August	36,549	6,578.82	7,309.80
	September	36,549	6,578.82	7,309.80
	October	36,549	6,578.82	7,309.80
	November	36,549	6,578.82	7,309.80
	December	36,549	6,578.82	7,309.80
1962	January	36,549	6,578.82	7,309.80
	February	36,549	6,578.82	7,309.80
	March	36,549	6,578.82	7,309.80
	April	36,549	6,578.82	7,309.80
12 months subsequent to May 3, 1961		438,588	$78,945.84	$87,717.60

* Estimated

113

(Docketed July 26, 1961)

July 26, 1961

IP No. 3501

Docket No. CI61-1221
H. L. Hunt (Operator), *et al.*
Docket No. CI61-1282
H. L. Hunt

H. L. Hunt
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Thomas G. Crouch

Gentlemen:

This is with reference to your applications for rehearing and reconsideration of the Commission's action, by letter dated May 31, 1961, in rejecting your conditional acceptances of temporary authority granted in the captioned dockets and related notices of change in rate schedules. The letter also clarified the intent of the temporary authorizations that there should be no change in the initial rates for the duration of the temporary authorization except by further order of the Commission. Reference is also made to your resubmittal of such acceptances and notices of change proposing increases in rates under such authority from 18.0¢ to 20.0¢ per Mcf. Such submittals are relative to sales of gas to Natural Gas Pipeline Company of America in the Alvin City and Alta Loma Fields, Brazoria and Galveston Counties, Texas.

As you were advised by our letter dated May 31, 1961, your proposals to increase the rates to 20.0¢ per Mcf thirty days from the dates of initial delivery are in conflict with the intent and purpose of the price conditions in the temporary authorizations.

(113)

Your retenders of June 30, 1961 of the proposed notices of change in rates are not in compliance with the conditions of the temporary authorizations issued by our letter orders of May 17 and April 7, 1961 in the captioned dockets and are hereby rejected and returned herewith. The retendered acceptances of temporary authority with reservations are likewise in conflict with the conditions therein and are also rejected and returned herewith. This action denies your applications for reconsideration

114

which duplicate, in effect, your prior applications for reconsideration in the subject dockets. The applications are rejected and returned herewith.

By direction of the Commission.

J. H. Gutride
Secretary

Enclosure No. 97817
14 copies of each application and one copy of each acceptance returned 7/28/61
cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois
P&F
7/20/61 LB 7/23/61
P&F 7/24/61
RLR
7/25/61

115

(Docketed Nov. 2, 1961)

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

100-2

H. L. Hunt
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

The Commission has, on its own motion, reconsidered and by this letter supplements its letters of May 31, 1961, and July 26, 1961, in *H. L. Hunt*, Docket No. CI61-1221, relating to the temporary authorization to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America. While it felt that the reasons for its action in conditioning the temporary authorization would be understood, it has concluded, in view of recent judicial and Commission decisions, that it should attempt a more explicit exposition of those reasons in order to dispel any doubt upon your part.

On September 28, 1960, prior to the time your certificate application was filed, the Commission issued a Statement of General Policy No. 61-1 which set forth rate standards based on its experience gained in six years of regulation of independent producers. By this Statement of Policy it found that the highest price for the area wherein you are selling gas should be established at 18¢ per Mcf at 14.65 psia. It felt that you have not established in connection with the issuance of temporary authorization any sufficient reason which would justify the collection of a higher price. Your contract calls for a price of 20¢ per Mcf with periodic

escalations of 2¢ per Mcf at the end of each subsequent four-year period for the twenty-year term of the contract. It should be noted that when all aspects of the price are considered, the price you are seeking to receive for your gas would be the highest price received by any producer under certificate authorization in this area. You have cited in support of your 20¢ per Mcf price the Commission's prior decisions in *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, 24 F.P.C. 1, as amended 24 F.P.C. 106, and *Trunkline Gas Company, et al.*, 21 F.P.C. 704. In so doing you ignore the very important fact that the 20¢ per Mcf price in both of these cases was allowed only because it was a firm price for ten years. That is, there would be no escalation in price permitted under the contract for a ten-year period. This the Commission found in *Trunkline* to be most important, stating at 21 F.P.C. 719:

116

> Secondly, and most important, these contracts provide for a firm 20-cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20-cent price is required by the public convenience and necessity; and, *it will not be sufficient for producers hereafter seeking certification to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price.* (Emphasis added.)

The Commission reiterated the importance of this factor in its *Peoples Gulf Coast* decision where it imposed a condition upon the producer authorizations requiring that the contracts be amended to eliminate the four-year escalation provisions, substituting therefor the ten-year period provided for in the *Trunkline* contracts. That condition im-

posed by the order in Docket No. G-19086, *et al.*, was accepted by the applicants in that proceeding. No new reason to allow an unconditioned certificate in this proceeding was advanced in any of the filings before the Commission at the time the temporary authorization was issued.

Furthermore, the 20-cent price which was allowed in the *Peoples Gulf Coast* proceedings for the firm period of ten years is, as a result of recent court action, open to question and a "suspect" price. For in *Public Service Commission of New York* v. *F.P.C.*, CADC Nos. 15366, *et al.*, decided June 15, 1961, the Court set aside the Commission denial of intervention in those proceedings by PSC of New York. Thus, the prices there involved are still open to question. Reliance upon such a basis to establish a new and higher price line would be wholly unwarranted.[1]

Moreover, information in the Commission's records also indicates that the charging under your contract of the 20¢ rate subject to a contingent obligation to refund may have an inflationary effect upon the prices charged and to be charged by others in the area, particularly where the 20¢ rate is only the first step of a periodically rising price. Each charging may "trigger" or serve as a basis for price redeterminations at higher levels under escalation provisions in the other contracts in the area and may well trigger higher prices by producers, both those

---

[1] See, *e.g.*, *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133, 137-138 (CA5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, Oct. Term, 1961, No. 149, decided October 9, 1961.

under contract and those who will, in the future, contract to sell natural gas.[2]

It is a fundamental prerequisite to the obtaining of a certificate that an independent producer show that his proposed initial price is in the public interest. The Commission's policy and the Natural Gas Act require each application to meet minimal standards as to the price factor. The Commission has sought to announce standards which have some element of precision in our General Policy Statement. No justification has been established by you in this proceeding, either in your application for temporary authorization or in allied filings, for the establishing of a higher price than that set forth in the General Policy Statement.

Nevertheless, upon reconsideration of the Commission's action in rejecting the rate schedule supplement which you tendered for filing in this proceeding in attempted compliance with the conditions in the temporary authorization that service be commenced at an initial price of 18 cents, the Commission has determined that the filing of the supplement will be allowed, if retendered. While filing will be allowed for the express purpose of permitting there to be on file the contractual agreement between you and Natural Gas Pipeline Company of America under which you will be receiving 18¢ per Mcf, this should not be construed as permission for you to file for an increased rate pursuant to Section 4 (d) of the Natural Gas Act during the pendency of the temporary authorization. The con-

[2] Among existing contracts which may be triggered or for which the proposed rate may serve as a basis for a price redetermination at a higher rate are: Gulf Oil Corporation, FPC Gas Rate Schedule No. 41, Sun Oil Company (Operator), *et al.*, FPC Gas Rate Schedule No. 41, Texaco Inc., FPC Gas Rate Schedule No. 141, Pan American Petroleum Corporation, FPC Gas Rate Schedule No. 98, Hudgins Oil and Gas Company, FPC Gas Rate Schedule No. 1 and Amerada Petroleum Corporation, FPC Gas Rate Schedule No. 8.

dition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4 (d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective

118

even though those rates might irrevocably breach the price line or trigger price increases. It has not been shown that the public interest will permit temporary authorization of the proposed sale without the condition heretofore prescribed by the Commission to prevent such consequences.

By Direction of the Commission.

J. H. Gutride
Secretary

201

(Received Feb. 27, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1283

In the Matter of:
HASSIE HUNT TRUST, OPERATOR, ET AL.

Application for Certificate of Public Convenience and Necessity for An Independent Producer Covering a Proposed Sale of Natural Gas to Natural Gas Pipeline Company of America. Alta Loma Area. Galveston County. Texas and for Temporary Authority to Commence Service Immediately

COMES NOW HASSIE HUNT TRUST (hereinafter referred to as "Applicant"), for and on behalf of itself and other coowners hereinafter designated whose gas may be subject to this Application, and hereby makes application for a Certificate of Public Convenience and Necessity pursuant to the terms of Section 7 of the Natural Gas Act, as amended, authorizing the sale of natural gas hereinafter described to Natural Gas Pipeline Company of America (hereinafter referred to as "Natural").

This filing is made under compulsion of the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders, without admitting that the Federal Power Commission has jurisdiction over either Applicant or the subject

202

matter of this Application, without prejudice to the rights of Applicant to contest the validity of said orders, and without prejudice to Applicant's rights to contest the jurisdiction of the Commission over the subject matter of

this Application; but specifically reserving all rights to pursue any and all remedies which Applicant may have relating to the asserted jurisdiction of the Commission.

In support of this Application, Applicant respectfully shows as follows:

I

DESCRIPTION OF APPLICANT

Section 157.24(a)(1)

The exact legal name of Applicant is Hassie Hunt Trust, a trust established under the laws of the State of Texas, with its principal office and place of business at 700 Mercantile Bank Building, Dallas 1, Texas. Applicant is authorized to do business in all states of the United States.

II

PREDECESSORS IN INTEREST

Section 157.24(a)(2)

Applicant has no predecessor in interest bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

III

PERSONS ON WHOM PAPERS ARE TO BE SERVED

The name, title and post office address of the persons to whom correspondence or communications in regard to this Application are to be addressed are:

Hassie Hunt Trust
700 Mercantile Bank Building
Dallas 1, Texas

Attn.: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

IV

Sales to Be Certificated

Section 157.24(a)(4)

The purpose of this Application is to obtain a certificate of public convenience and necessity authorizing the sale of Applicant's 6.19135% interest together with certain co-owners' interests in the natural gas produced from the well located on the Hassie Hunt Trust-Marcus Jensen *et al.* Unit in the Alta Loma Area, Galveston County, Texas. Approximately 72% of the gas to be produced has been previously dedicated to Trunkline Gas Company and this Commission has certificated such sale at an initial price of 20¢ per MCF. Applicant proposes to sell approximately 28% of the gas to be produced to Natural under and pursuant to the terms of that certain Gas Sales Contract dated December 15, 1960, between Applicant, as Seller, and Natural, as Buyer. Applicant has been informed, and therefore states on information and belief, that Natural

will transport or sell for resale in interstate commerce such natural gas or portions thereof.

(i) All of Applicant's gas sold to Natural pursuant to said Contract will be produced from the above described unit in which Applicant has a working interest and which Applicant is the operator of. The point of delivery to Natural will be at a mutually agreeable point in the Alta Loma Area in Galveston County, Texas, which will be the same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959, with Texas Illinois Natural Gas Pipe Line Company, wherein Applicant received a Certificate of Public Convenience and Necessity to commence sales at an initial price of 20¢ per MCF to Peoples Gulf Coast Natural Gas Pipe Line Company by Order

issued July 1, 1960, under Docket Nos. G-19086, *et al.* None of Applicant's gas sold to Natural will be purchased by Applicant from third parties.

(ii) Such sale of gas does not involve the use of any of Applicant's pipelines subject to the jurisdiction of the Commission.

(iii) Applicant does not propose to serve any communities with gas either at wholesale or retail.

(iv) Applicant does not propose to deliver or sell gas to any "main line industrial customers" in this Application.

(v) The sale proposed herein does not involve the use of any major pertinent properties and facilities subject to the jurisdiction of the Commission.

V

SUMMARY OF CONTRACT OF SALE

Section 157.24(a)(5)

In compliance with the Commission's Regulations, the following is a summary of the Gas Sales Contract which will govern the sale proposed herein, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference:

205

1. Name of Seller: Hassie Hunt Trust
2. Name of Purchaser: Natural Gas Pipeline Company of America
3. Location of Sale: Alta Loma Area, Galveston County, Texas
4. Date of Contract: December 15, 1960
5. Initial Price per MCF (including tax reimbursement: 20¢
6. Measurement Pressure Base: 14.65 psia

7. Types of Escalation Provisions: Periodic
8. Hydrocarbon liquids included: No
9. Other Price Adjustments: Reimbursement of new taxes
10. Estimated Initial Volumes (MCF per day): 130
11. Delivery Pressure: Sufficient to enter Buyer's pipeline; not to exceed 1,000 psig.
12. Delivery Point: The same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959, with Texas Illinois Natural Gas Pipe Line Company, which sale was certificated by this Commission at an initial price of 20¢ per MCF by order issued July 1, 1960, under Docket Nos. G-19086, *et al.*

VI

Exhibits

Exhibit "A"—Map

There is attached hereto as Exhibit "A" a general map relating to the proposed sale of gas described hereinabove, setting forth the general geographical location of the properties covered by this Application. Said map does not reflect the items mentioned in Subparagraphs (b), (c), (d), (e) and (f) of Section 157.25 of the Commission's Regulations since same are not applicable to the subject sale.

Exhibit "A-1"—Map

There is attached hereto as Exhibit "A-1" a map of the Alta Loma Area which shows the location of the well (red dot) located on the Hassie Hunt Trust-Marcus Jensen, *et al.* Unit from which the gas will be produced. In addition, the point of delivery to Natural is shown by a red arrow which is the same point of delivery provided for in Applicant's Gas Sales Contract dated May 15, 1959,

which was approved by this Commission in its Order issued July 1, 1960, under Docket Nos. G-19086, *et al.* All sales of gas produced from the thirty-four (34) wells listed on the map, together with approximately 72% of the gas to be produced from the well which is the subject of this Application, have been previously certificated by this Commission at

207

an initial price of 20¢ per MCF. This Commission in its Opinion No. 321 issued May 22, 1959, In the Matter of *Trunkline Gas Company, et al.*, Docket Nos. G-15394, *et al.*, certificated sales to Trunkline Gas Company at an initial price of 20¢ per MCF; those sales to Trunkline at the 20¢ per MCF price are shown for twenty-six (26) of the wells in solid black. This Commission in its Order issued July 1, 1960, in Docket Nos. G-19086, *et al.*, certificated sales to Peoples Gulf Coast Natural Gas Pipe Line Company at an initial price of 20¢ per MCF; those sales to Natural are shown for thirty-four (34) of the wells by the striped circles.

Exhibit "B"—Contract

There is attached to this Application as Exhibit "B" a copy of that certain Gas Sales Contract dated December 15, 1960, by and between Hassie Hunt Trust, as Seller, and Natural Gas Pipe Line Company of America, as Buyer. Said Gas Sales Contract is marked Exhibit "B" for identification and made a part hereof for all purposes.

Exhibit "C"—List of Coowners

Attached hereto is a list of the coowners and of the percentum of ownership of each in the well located on the Hassie Hunt Trust-Marcus Jensen, *et al.*, Unit from which Applicant is proposing to sell gas to Natural in this Application.

VII

Temporary Authorization

Section 157.28

Applicant hereby declares his intention to invoke Section 157.28 of the Commission's Order No. 193 issued November 20, 1956, for temporary authority to begin the immediate sale of natural gas which is the subject matter of this Application. In connection therewith Applicant states as follows:

1. The sale will be made to Natural in accordance with the Contract attached hereto as Exhibit "B".
2. An economic hardship exists which results from the necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than Natural.
3. This temporary authorization does not apply to the termination of any sale or transportation or with respect to service proposed to commence more than thirty (30) days from the date of filing this statement as required by Paragraph (c) of Section 157.28.
4. Natural has been authorized to construct and operate such facilities as may be necessary

to enable Applicant to make delivery to Natural of the gas proposed to be sold by Applicant. Natural's authorization is set forth in the Commission's Order issued July 1, 1960, under Docket Nos. G-19086, *et al.*

Since this Commission has previously certificated sales of gas at an initial price of 20¢ per MCF from thirty-four

(34) wells in the same field and area, as well as for approximately 72% of the gas to be produced from the same well from which Applicant proposes to produce its gas, Applicant should receive temporary authorization to commence sales immediately without price condition. Failure to issue Applicant temporary authorization to commence sales at an initial price of 20¢ per MCF will be discriminatory as well as an abuse of the Commission's discretion and will subject Applicant to economic hardship as well as possible liability in view of such discrimination.

VII

Facilities

Applicant's description or showing of or reference to any facilities in this Application or in any exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a Certificate of Public Convenience and Necessity for the

construction or operation of such facilities. All such facilities constitute, in the opinion of the Applicant, facilities for the production or gathering of natural gas, or both, within the meaning of Section 1(b) of the Natural Gas Act, whether or not Applicant is a natural gas company, and, therefore, no certificate of public convenience and necessity is required or sought for such facilities.

Wherefore, Applicant respectfully requests:

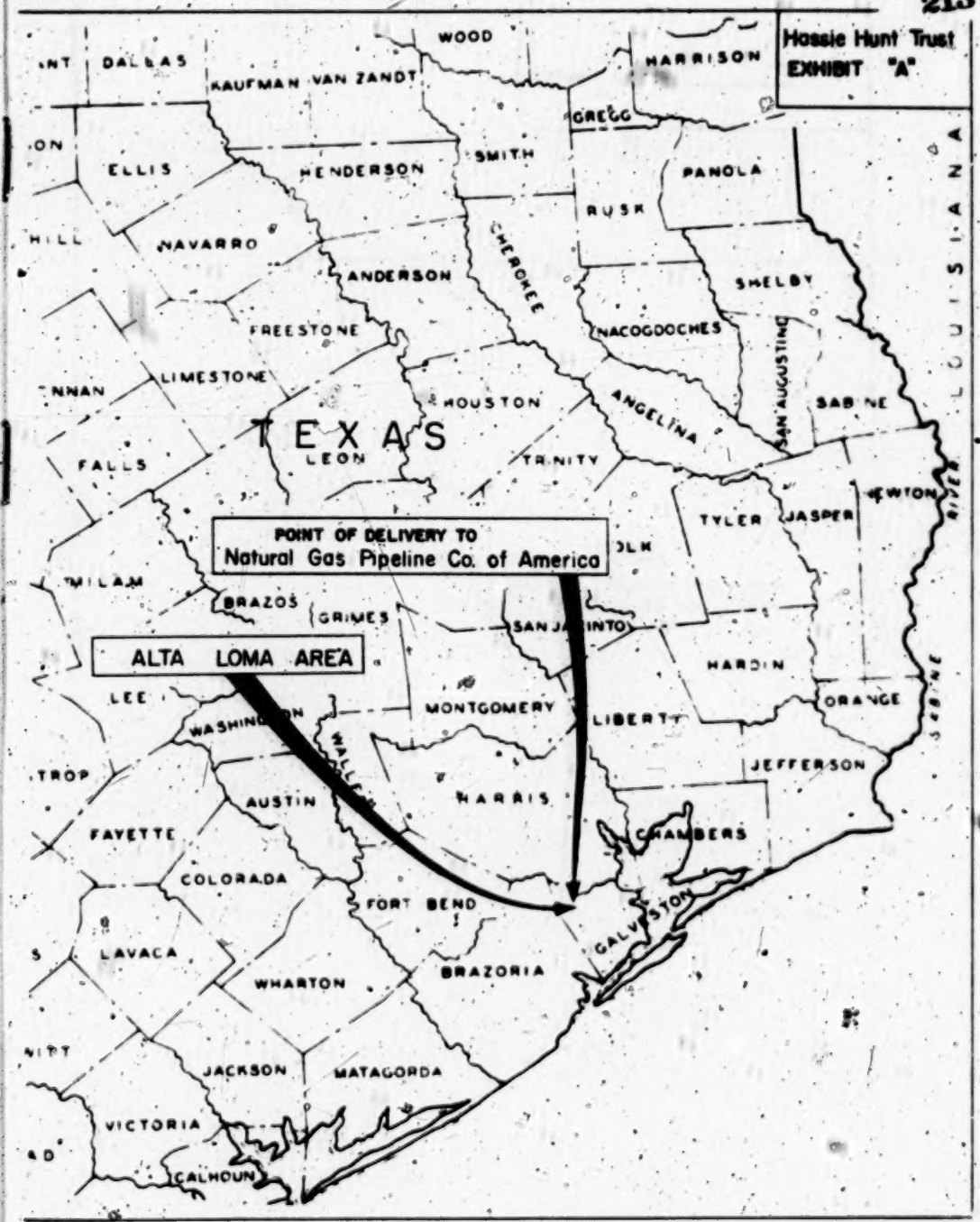
That it be issued a Certificate of Public Convenience and Necessity authorizing it to make the foregoing sale of gas under the aforesaid Contract and that there be issued immediately the requisite temporary authorization to commence such sale as above requested, and Applicant hereby requests that the intermediate decision procedure

be omitted and oral argument and opportunity for filing exceptions to the decision of the Commission be waived, and requests that this Application be heard under the shortened procedure.

Applicant has caused this Application to be subscribed by its duly authorized Attorney at Dallas, Texas, this 24th day of February, 1961.

Respectfully submitted,

HASSIE HUNT TRUST
By ROBERT W. HENDERSON,
Robert W. Henderson,
Attorney


Hassie Hunt Trust
EXHIBIT "A"
WOOD
HARRISON
DALLAS
KAUFMAN
VAN ZANDT
GREGG
ELLIS
HENDERSON
SMITH
PANOLA
RUSK
NAVARRO
CHEROKEE
ANDERSON
SHELBY
FREESTONE
NACOGDOCHES
SAN AUGUSTINE
LIMESTONE
HOUSTON
ANGELINA
SABINE
TEXAS
LEON
TRINITY
FALLS
NEWTON
TYLER
JASPER
POINT OF DELIVERY TO
Natural Gas Pipeline Co. of America
BRAZOS
GRIMES
ALTA LOMA AREA
HARDIN
LEE
MONTGOMERY
LIBERTY
ORANGE
JEFFERSON
AUSTIN
HARRIS
FAYETTE
CHAMBERS
COLORADO
FORT BEND
GALVESTON
LAVACA
WHARTON
BRAZORIA
JACKSON
MATAGORDA
VICTORIA
CALHOUN
LOUISIANA

217

GAS SALES CONTRACT

THIS CONTRACT made as of the 15th day of December, 1960, by and between NATURAL GAS PIPELINE COMPANY OF AMERICA, a Delaware corporation, herein called "Pipeline", and HASSIE HUNT TUUST, whose Trustee is W. H. Hunt, herein called "Seller";

WITNESSETH:

THAT in consideration of the sum of Ten Dollars ($10.00) paid by Pipeline to Seller, receipt of which is acknowledged, the parties agree as follows:

* * * * * * * * * *

234

ARTICLE NINTH

PRICE, BILLING AND PAYMENT

1. Pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder the prices stated as hereinafter provided: for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents; for gas delivered during the second four (4) year period twenty-two (22) cents; for gas delivered during the third four (4) year period twenty-four (24) cents; for gas delivered during the fourth four (4) year period twenty-six (26) cents; for gas delivered thereafter, twenty-eight (28) cents.

2. After deliveries of gas have commenced, Pipeline shall, on or before the twentieth (20th) day of each month, render to Seller a statement showing the quantity of gas delivered during the preceding calendar month and any adjustments made by Pipeline, and shall pay Seller the amount due for all such gas.

3. Notwithstanding the provisions of paragraph two (2) above, in the event Seller's gas is delivered hereunder commingled with the gas of others, on or before the tenth (10th) day of each month, Pipeline shall render Seller a statement showing the volume of commingled gas delivered during the preceding calendar month, and within ten days thereafter Seller shall forward or cause to be forwarded to Pipeline a statement, upon which Pipeline may rely, showing the volume of commingled gas attributable to Seller and the volumes thereof attributable to parties other than Seller, for the preceding calendar month, the sum of which shall equal the total volume metered by Pipeline. Within ten days thereafter Pipeline shall pay Seller the amount due for gas delivered during the preceding calendar month and shall furnish Seller with sufficient information to explain and support any adjustments made by Pipeline in determining the amount due Seller.

4. Each party hereto shall have the right at all reasonable times to examine

the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to this contract. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

Article Tenth

Taxes

Pipeline shall reimburse Seller for three-fourths (¾) of any increase occurring after the date of this contract, in the total tax paid or payable per one thousand (1,000) cubic feet by Seller and/or Seller's royalty owners, occasioned by any change in the rate, tax base, or basis of

computation of the existing production or severance tax or by the imposition or substitution of any new excise tax, including sales, occupation, severance, gathering, or other taxes of like nature imposed upon Seller in respect to gas delivered under this contract.

244

(Docketed April 7, 1961)

Docket No. CI61-1283
Hassie Hunt Trust, Operator, et al. AIRMAIL

Hassie Hunt Trust
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

Temporary authority is hereby issued to Hassie Hunt Trust, Operator, et al., to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America as proposed in Docket No. CI61-1283, subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

Your related proposed rate schedule will be considered accepted for filing upon compliance with the above condi-

tioned authorization to be effective on the date of initial delivery subject to the provisions of Sections 154.94 (c) and 154.101 of the Commission's regulations under the Natural Gas Act.

In view of the above conditions, the billing statement submitted with your filing is not applicable and accordingly is returned herewith.

The rate schedule has been designated as follows:

Description	Designation
Contract 12-15-60	Hassie Hunt Trust (Operator), et al. FPC Gas Rate Schedule No. 28

Please advise the Commission of the date of commencement of deliveries under such rate schedule making reference in your communication to the rate schedule as designated above.

In addition, please advise the Commission as to whether you would accept permanent certificate authorization under the condition specified in (1) above. Such acceptance may permit disposition of the subject application under the abridged hearing procedure provided no protests or petitions to intervene in opposition to the application are filed.

This authorization and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the

Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. GUTRIDE
Secretary

Enclosure No. 84941
cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

Approved by the Commission

RGC
WC:ega
3-17-61

246

WESTERN UNION

(Docketed April 25, 1961)

ASA369 DA413 D LLN139 PD FAX DALLAS TEX 25 323P OST
HON JOSEPH H GUTRIDE
FEDERAL POWER COMMISSION WASHDC

BY LETTER DATED APRIL 7 1961 TEMPORARY AUTHORITY WAS ISSUED UNDER DOCKET NO CI61-1283 TO HASSIE HUNT TRUST OPERATOR ET AL CONDITIONED UPON THE COMPLIANCE OF SEVERAL MATTERS WITHIN 20 DAYS FROM APRIL 7 1961. RESPECTFULLY REQUEST EXTENSION OF THE 20 DAY PERIOD TO 30 DAYS

HASSIE HUNT TRUST BY ROBERT W HENDERSON ATTORNEY

247

(Docketed April 26, 1961)

MCX GOVT COLLECT

Robert W. Henderson, Esq., 700 Mercantile Building,
Dallas 1, Texas

Reurtel April 25. Extension hereby granted to Hassie Hunt Trust, Operator, et al., to and including May 8, 1961 within which to comply with conditions of Commission's letter of April 7, 1961 in Docket No. CI61-1283.

Joseph H. Gutride Secretary Federal Power Commission
SEC:LS Hassie Hunt Trust, Operator, et al., Docket No. CI61-1283 4/26/61
MJ 4/26/61
cc:
Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois
cc:
OGC
RGC

JHG
4/26/61

248

(Docketed May 5, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1283

In the Matter of:
HASSIE HUNT TRUST,
OPERATOR, ET AL.

Acceptance by Hassie Hunt Trust of Temporary Authority With Reservations

HASSIE HUNT TRUST, Applicant, filed in the captioned docket an Application for a Certificate of Public Convenience and Necessity requesting authority to sell natural gas to Natural Gas Pipeline Company of America (Natural). The Application also contained a request for temporary authority to commence service immediately. By letter issued April 7, 1961, the Commission granted temporary authority to commence immediately the sale upon the following conditions:

1. That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.
2. The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.
3. Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

249

Applicant is being severely drained by other producers in the field selling gas to other pipeline purchasers from

wells completed in the same reservoirs as Applicant's well which is the subject of its Application; therefore, in view of this severe drainage, Applicant is constrained to accept, and does hereby accept the temporary authority for the sale proposed in accordance with the conditions set forth above; provided, however, that this acceptance is made without prejudice to and with the express reservations of the following rights of Applicant:

1. The rate schedule shall be temporarily amended in accordance with the instrument attached hereto as Exhibit "A" which shall be effective only so long as deliveries are made under the temporary authorization of April 7, 1961, with the same price condition therein contained.

2. Since Applicant does not believe the conditions attached to the temporary authorization are proper or reasonable, Applicant reserves all its rights to take all necessary and appropriate steps to obtain their removal by filing an Application for Rehearing and, if necessary, a Petition for Review.

3. Deliveries to Natural will be without prejudice to Applicant's rights to seek removal of the conditions, to seek an unconditional permanent certificate at 20¢ per MCF at 14.65 psia and to seek increases in the price in accordance with the rate schedule, as amended, by the instrument attached as Exhibit "A".

EXECUTED this 19th day of April, 1961.

APPROVED:

MURRY HEY
Member Advisory Board

HASSIE HUNT TRUST
By W. H. HUNT
W. H. Hunt, *Trustee*

wer
Rwh

250

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 19th day of April, 1961.

JUDY D. HOLT
Notary Public in and for
Dallas County, Texas

My Commission expires June 1, 1961.
[SEAL]

253

(Docketed May 5, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1283

In the Matter of:
HASSIE HUNT TRUST (Operator), *et al.*

Application for Rehearing

COMES NOW HASSIE HUNT TRUST, hereinafter referred to as "Petitioner," pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Com-

mission's Rules of Practice and Procedure, being an aggrieved party, and applies for rehearing and reconsideration of the Commission's Letter Order of April 7, 1961, in the above-captioned proceeding.

I

PRELIMINARY STATEMENT

Petitioner on February 27, 1961, filed its Application for a Certificate of Public Convenience and Necessity, together with a request for temporary authority to commence service immediately. The filing covered Petitioner's 6.19135% interest in the Hassie Hunt Trust-Marcus Jensen Unit, Alta Loma Area, Galveston County, Texas, as well as the interests of other co-owners whose gas may be

254

subject to its Application and which has not been dedicated previously to other interstate pipeline purchasers. One well is located on the Unit which contains 324 acres.

In response to Petitioner's request for temporary authorization, this Commission issued its Letter Order of April 7, 1961, which designated Petitioner's contract of December 15, 1960, with Natural Gas Pipeline Company of America, as "Hassie Hunt Trust (Operator), *et al.*, FPC Gas Rate Schedule No. 28," and granted temporary authority subject to the following conditions:

"(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

"(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof."

By telegram dated April 26, 1961, Petitioner requested an extension of the twenty-day period to thirty days. An extension to and including May 8, 1961, was granted by Commission telegram dated April 26, 1961.

255

II

ASSIGNMENT OF ERRORS AND REASONS IN SUPPORT THEREOF

A. The Commission Erred in Attaching a Price Condition to the Temporary Authorization Because the Facts Presented Do Not Justify or Substantiate a Price Condition.

The controversy in this proceeding is due to the drilling and completion of the well on the Hassie Hunt Trust-Marcus Jensen Unit subsequent to the date that Petitioner dedicated its producing properties to Texas Illinois Natural Gas Pipeline Company (now Natural Gas Pipeline Company of America) under the Gas Sales Contract dated May 15, 1959, which the Commission designated as Hassie Hunt Trust (Operator), *et al.*, FPC Gas Rate Schedule No. 26. In effect, there is no difference from this controversy than the situation where a producer amends his previously-certificated sale at an initial price of 20¢ per MCF by adding additional acreage to his contract which has become productive since the date of execution and the date of certification. Why should the later-developed acreage receive certification at a price which is 2¢ per MCF less than the previously-certificated acreage where all of such acreage is located in the same field, the gas is being produced from the same reservoirs, the pipeline purchaser is the same, and the producer-seller is the same?

The Hassie Hunt Trust-Marcus Jensen Unit is located in a field containing some thirty-four (34) wells

from which gas is presently being sold in interstate commerce for resale at an initial price of 20¢ per MCF at 14.65 psia. The unit is bounded on the east by Petitioner's Wilkins, Sass and O'Daniel Units. This Commission has previously certificated sales from each of said units at an initial price of 20¢ per MCF at 14.65 psia.

Exhibit "A-1" of Petitioner's Application is a plat showing the location of thirty-four (34) wells in the field where this Commission has permanently certificated sales at the initial price of 20¢ per MCF at 14.65 psia. The Commission first certificated initial prices of 20¢ per MCF in its Opinion No. 321 issued May 22, 1959. In the Matters of *Trunkline Gas Company, et al.*, Docket Nos. G-15394, *et al.*, (21 FPC 704). Sales were authorized at the initial price of 20¢ per MCF at 14.65 psia to the following companies in the following docket numbers:

Phillips Petroleum Company	G-15471
	G-15472
Union Oil Company of California	G-15485
	G-15486
	G-15487
The Superior Oil Company	G-16147
Nicklos Oil and Gas Company	G-16222
Tidewater Oil Company	G-16267
Pan American Petroleum Corp.	G-15438
	G-16501
	G-16502
J. S. Michael Company	G-16551
J. S. Michael	G-16570

This Commission under Order dated October 27, 1959, again certificated sales to Trunkline Gas Company at

257

an initial price of 20¢ per MCF at 14.65 psia to the following producers in the following docket numbers:

Austral Oil Co., Inc.	G-15819
John W. Mecom	G-16975
Union Oil Company of California	G-17263
Seadrift Pipeline Corp.	G-17044

In these proceedings a full hearing was not required since the sales were certificated under the shortened procedure. The producer-sellers were not required to present any evidence to obtain *permanent* certificates at their proposed prices of 20¢ per MCF at 14.65 psia.

This Commission is fully aware of the differences between the previously-certificated sales to Trunkline Gas Company and the sale proposed by Petitioner to Natural. The gas sales contracts of the producer-sellers to Trunkline require Trunkline to accept delivery of the gas at each well. The above-referred-to Exhibit "A-1" to Petitioner's Application shows twenty-six (26) wells scattered throughout the field which have been partially dedicated to Trunkline. An extensive gathering system was required before Trunkline commenced its takes from the wells shown. Petitioner, on the other hand, is not making a well-head delivery. The contract requires a central point delivery in the field. The referenced plat shows the location of Petitioner's well in relation to the delivery point and it is readily apparent that a gathering cost will be incurred in making delivery

258

to Natural which was not the case in the Trunkline sales. Reference is made to the testimony of Witness Burns, Vice-President of Peoples Gulf Coast Natural Gas Pipeline Company (now Natural Gas Pipeline Company of America) in Docket No. G-19086, *et al.*, which concerned the same field, the same pipeline purchaser, the same producer-seller,

as well as others, and the same initial price of 20¢ per MCF at 14.65 psia, wherein he stated:

> "We realized that the Hunts had had an offer to sell the gas in Alta Loma and Alvin Fields at 20 cents per Mcf whereby the purchaser would agree to gather the gas from the wells and bring the gas to a mutually agreeable point for dehydration, which was to be performed by the purchaser; therefore, we had our engineering department make calculations so as to indicate the cost to Peoples Gulf Coast to gather and dehydrate the gas in each of the fields involved. The engineering department advised me that the cost to Peoples Gulf Coast to gather and dehydrate the gas in the Alta Loma, Alvin, and Fulton Beach Fields would be approximately two or three cents per Mcf." (Tr. 607)

This Commission has previously recognized conditions of delivery in determining whether a proposed price is out of line. In Opinion No. 335, *El Paso Natural Gas Company*, Docket Nos. G-13862, *et al.*, issued February 23, 1960, this Commission stated:

> "The *Catco* case indicates that a matter of important concern is whether or not the proposed price is 'out of line', a question calling for a comparison of the proposed price with prices for other, comparable producer sales to the pipeline

259

> company applicant and to other purchasers. In making such comparisons, *due regard should be given such factors as* extent of reserves, quality of gas, *conditions of delivery*, extent of processing, and the like." (Page 8) (Emphasis added.)

By Order issued August 10, 1959, In the Matter of *J. M. Huber Corporation*, FPC Docket No. G-13800, (Mimeograph Pages 4 and 5), the Commission stated:

"If this 2.71¢ per MCF is deducted from the 16.0¢ per MCF figure, we arrive at a wellhead price of 13.29¢ for this unpressurized gas."

"We take administrative notice of the fact that we have certificated many of these sales and that the prices for such sales were wellhead prices for the gas and not the price of gathered gas."

In these cases this Commission has taken into consideration the difference between the price of gas delivered at the wellhead and the gas delivered at a central point, and has recognized that gas delivered at a certain price at a central point is not comparable to gas delivered at the same price at the wellhead.

In addition to the certification of sales to Trunkline at initial prices of 20¢ per MCF, this Commission on July 1, 1960, in its Order in *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, Docket Nos. G-19086, *et al.*, (24 FPC 1), issued permanent certificates of public convenience and necessity to Petitioner in Docket No. G-19115,

and to Placid Oil Company in Docket No. G-19125, covering sales of natural gas to Peoples Gulf Coast Natural Gas Pipeline Company (now Natural). These sales were certificated at 20¢ per MCF at 14.65 psia. Like the Trunkline certification, the gas to be produced is from the same reservoirs and the same field as Petitioner's proposed sale, but in the latter certification the additional features are that the same pipeline purchaser and the same producer-seller are involved. The July 1, 1960, Order was issued after hearings had been held from April 11, to April 29, 1960, and from May 17, to May 20, 1960. After a complete record was developed, this Commission approved the motion requesting waiver of the intermediate-decision procedure and heard oral argument on June 16, 1960. In that proceeding

Petitioner was seeking authority to sell gas at the same price as it is proposing in this proceeding. The paramount issue in that proceeding, as stated by the Commission, was:

> "The issues which are presented in these proceedings are . . . (4) whether the independent producers have demonstrated that the public convenience and necessity require the sale of natural gas by them and, if so, at what initial price such sales have been justified." (24 FPC 2)

This Commission concluded that the sales were required by the public convenience and necessity and certificated the sales at the proposed initial price of 20¢ per MCF at 14.65 psia.

261

The Order of July 1, 1960, granted certificate approval for sales at 20¢ per MCF at 14.65 psia from thirty-four (34) wells. Petitioner owned an interest in each of the thirty-four wells. All of the wells are shown on Exhibit "A-1" of Petitioner's Application for a Certificate of Public Convenience and Necessity. All contracts involved in that proceeding were dated May 15, 1959. The only reason that Petitioner was not seeking a certificate in that proceeding for the gas which is the subject of its present application was because the acreage was unproductive on May 15, 1959. The well on the Unit which is the subject of this proceeding was not drilled and completed until July 21, 1960. If the well had been in existence, it would have been dedicated under Petitioner's Contract of May 15, 1959, and it would now have in its possession a Certificate of Public Convenience and Necessity approving the sale to Natural at the proposed initial price of 20¢ per MCF.

Based upon these facts, do they justify or substantiate a price condition? Absolutely not. To the contrary, these

facts support the issuance of temporary authorization in accordance with the contract initial price of 20¢. When this Commission summarily, without hearing, issues an order, shouldn't such an order be based upon factual information which the Commission has knowledge of even though acquired

in presentations in prior cases? Certainly the facts which this Commission has knowledge of don't justify or substantiate a price condition insofar as Petitioner is concerned. This Commission has clearly abused its discretion in issuing its Order of April 7, 1961, requiring the 2¢ reduction in the initial price after granting to Petitioner a Certificate of Public Convenience and Necessity to make sales at 20¢ per MCF from thirty-four other wells in the same field.

Exhibit "C" to Petitioner's Application for a Certificate of Public Convenience and Necessity shows that approximately 72% of the gas to be produced has been previously dedicated to Trunkline Gas Company at an initial price of 20¢ per MCF which this Commission previously has certificated. Upon what justification can this Commission conclude that approximately 72% of the gas to be produced is required by the public convenience and necessity at an initial price of 20¢ per MCF and that the other 28% is required by the public convenience and necessity at an initial price of 18¢?

B. *The Commission Erred Since Its Action Is Clearly Unreasonable, Arbitrary, Capricious and Discriminatory as to Petitioner.*

This Commission has heretofore indicated that a policy of fairness and equality to all parties should be adhered to in the application of its powers under the Act.

The intention to follow this principle was expressed in the *Reef Fields* Case, 19 FPC 351. There this Commission stated:

> ". . . we conclude now that it would be inequitable, unfair, and unduly discriminatory to continue the suspension of the rate increase sought. *Mindful of our responsibility to treat those similarly situated with equality consonant in the premises, we think it is proper and in the public interest that we, upon our own motion, vacate the suspension, accept the rate change for filing, and terminate this proceeding.*" (Emphasis added.)

This policy was also recognized by this Commission in Opinion No. 310 issued April 4, 1958, In the Matters of *Pan American Petroleum Corporation, et al.*, Docket Nos. G-8549, *et al.*, (19 FPC 463) when it stated:

> "Finally, considering all of the circumstances in this case including, *inter alia* . . . that we have been allowing higher rates to go into effect without suspension and with no more justification than has been shown here, we conclude that it would be grossly inequitable to deny the proposed increase in rates." (19 FPC 472)

> "We have permitted numerous increases in this area to what we have felt was the prevailing field price . . . For us now to require further proceedings would amount to undue discrimination on our part against these rate proponents." (19 FPC 474)

This Commission has allowed twelve (12) other producer-sellers in this same field to make sales of natural

gas in interstate commerce for resale at the same price proposed by Petitioner. It also has allowed Petitioner to make sales of natural gas in interstate commerce for

resale from thirty-four (30) wells at the same price proposed by Petitioner for this one well. Petitioner, as well as the other producer-sellers, are producing their gas from the identical reservoirs from which Petitioner's subject well will be produced. One of the other producer-sellers is selling to the same pipeline purchaser.

This Commission's Order of April 7, 1961, was indeed shocking since it reflected action on the part of this Commission which deviated from the Commission's previously-stated policy of fairness and equality. Any procedure established by this Commission which adopts discriminatory practices is violative of the purpose and spirit of the Act and amounts to an abuse of administrative discretion. To discriminate against Petitioner by requiring that the proposed initial price be reduced from 20¢ per MCF to 18¢ per MCF, where this Commission has permanently certificated many 20¢ prices after full hearings, involving, in one case, the same pipeline purchaser, the same producer-seller, the same field and the same gas reservoirs, and where all such facts already have been presented and considered by this Commission, is unreasonable and is an abuse of discretion on the part of this Commission.

265

In this proceeding the Commission is concerned with the same producer-seller, the same pipeline purchaser, the same field and the same gas reservoirs which were involved in the previous hearing under Docket Nos. G-19086, *et al.*, which required some twenty hearing days. To force Petitioner to incur the additional time and expense to retry the same facts considered by this Commission less than a year ago is to deny Petitioner due process of law.

This Commission has previously recognized that it is not in the public interest to have two different prices in the same field for sales to the same pipeline purchaser.

In Opinion No. 340 issued January 27, 1961, In the Matter of *United Carbon Company, et al.*, Docket Nos. G-9572, *et al.*, (_____ FPC _____) this Commission stated:

> "Since the cost evidence supports Columbian Fuel's rate of 26 cents per Mcf to United Fuel, for sales of gas from eastern Kentucky, United Carbon should not be required to charge a lower rate for similar sales to the same customers from the same area. Any such difference, in our opinion, would tend to discourage production of gas by United Carbon and would not be in the public interest." (Page 11 of mimeographed Opinion)

For this Commission to create a situation where gas is sold at 20¢ per MCF from thirty-four (34) wells and 18¢ per MCF from one (1) additional well in the same field as the thirty-four is certainly not in the public interest. By what justification can this Commission conclude that approximately

72% of the gas from this one well is required by the public convenience and necessity at an initial price of 20¢ per MCF while the other 28% is required by the public convenience and necessity at 18¢? In creating such a situation, consideration should be given to the various legal ramifications being forced upon Petitioner by Petitioner's initial contract price being set at a lower rate than other contract prices which previously have been certificated by the Commission. Petitioner owns numerous oil and gas leases in the Hassie Hunt Trust-Marcus Jensen Unit which contain binding contractual obligations to pay royalties on the basis of the market value of the gas at the wellhead. An example of such an oil and gas lease provision is as follows:

> ". . . The royalties to be paid by Lessee are . . . on gas, including casinghead gas, or other gaseous sub-

stances, produced from said land and sold or used off of the premises or for the extraction of gasoline or other products therefrom, the *market value* at the well of 1/8 of the gas so sold or used, provided that on gas sold at the wells, the royalty shall be 1/8 of the amount realized from such sale . . ." (Emphasis added.)

By certificating 72% of the gas to be produced from the well at 20¢ per MCF while certificating the other 28% at 18¢ per MCF, how would this Commission advise Petitioner to comply with its legal contractual obligations? Thus, unless Petitioner is granted temporary authority to sell gas at the same price previously certificated by this Commission,

Petitioner may find itself in the position of having to determine royalty on the basis of the market value in the field even though it is selling gas at a lesser price as a result of the discrimination being forced upon Petitioner by this Commission. Such discrimination would deprive Petitioner of due process afforded by the Constitution. The creation of such discrimination by administrative fiat results in an administrative abuse of discretion.

The proposed initial price of Petitioner is further supported by the current competitive level of prices in the area. This Commission recognized that the current competitive level of prices in 1959 was 20¢ per MCF in the *Trunkline Opinion*, when it stated:

"The record contains uncontradicted testimony that the current competitive level of prices in Brazoria and Galveston Counties is 20 cents per Mcf, and that the demand for gas for intrastate uses in this highly industrialized area at this price is so great that Trunkline would not be able to buy any significant reserve at lower prices." (21 FPC 718)

This Commission stated that the predominate price over two years ago was 19.5¢ per MCF:

> "The field price evidence in this proceeding thus indicates a pattern of prevailing prices for the Texas Gulf Coast area in the range of 17.5 to 21.5 cents per Mcf, and within this range the price of 19.5 cents per Mcf

268

> appears to predominate. If we were to rely upon this evidence alone, we would be inclined to condition the initial price for the proposed Texas sales at 19.5 cents per Mcf. However, there are other considerations here which lead us to conclude that these sales should be certificated at the contract price of 20 cents per Mcf." (21 FPC 718, 719)

The *Trunkline Opinion* was based upon a record covering facts in existence prior to the year 1959.

Assuming *arguendo* that a price condition of 19.5 cents was proper in May of 1959, (the date of the *Trunkline Opinion*) based upon competitive field prices, an initial price of 20¢ per MCF is certainly proper in 1961, based upon the general increase in the cost of doing business. Petitioner in December, 1960, granted all of its employees a five (5%) per cent wage increase at the same time the oil and gas industry granted such increases. The Commission can certainly take knowledge of the general increase in the cost of doing business over the past two years when considering an approximate two and one-half (2½%) per cent increase in the price of gas and especially when the gas industry's labor cost has increased by five (5%) per cent.

The Commission's Order of April 7, 1961, does not disclose how this Commission arrived at the 18¢ price condition. Based upon prior statements of this Commission, the current competitive level of prices is 20¢ per MCF and the

predominate price, as early as 1959, was 19.5¢. There can be no question that the competitive field price is 20¢ per MCF since all gas is being sold at such price. There also can be no question that the competitive price of the gas to be produced from the well located on Petitioner's Marcus-Jensen Unit is 20¢ since this Commission previously has certificated approximately 72% of the sales at 20¢. With such knowledge, this Commission has abused its discretion in issuing the temporary authorization conditioned upon reduction of the 20¢ initial price to 18¢. Such action is unreasonable, arbitrary, capricious and discriminatory as to Petitioner.

C. *Assuming Arguendo That the Facts Justify and Substantiate the Price Condition, That the Commission Has Not Abused Its Discretion, and That the Price Condition Is Not Unreasonable, Arbitrary, Capricious and Discriminatory as to Petitioner, the Commission Erred in Imposing the Price Condition Since Such Action Overturns Prices Agreed Upon by the Parties and Subjects Petitioner to Loss Which Never Can Be Recouped Thereby Depriving it of Property Without Due Process of Law.*

Section 7(e) of the Natural Gas Act provides:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

In *United Gas Pipeline Company* vs. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 US 332 (1956) the Supreme Court stated:

270

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 US 338)

". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 US 343)

In *Atlantic Refining Company, et al.*, vs. *Public Service Commission of the State of New York, et al.*, 70 Sup. Ct. 1246, 360 US 378 (1959) (The CATCO Decision), the Supreme Court stated:

"What we do say is that the inordinate delay presently existing in the processing of Section 5 proceedings requires a most careful scrutiny and responsible reaction to *initial* price proposals of producers under Section 7." (Emphasis added.)

The Court further held:

"In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other*

271

sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate."

"And Section 7 is given only that scope necessary for 'a single statutory scheme under which *all rates are established initially by the natural gas companies*, by contract or otherwise, and all rates are subject to being modified by the Commission . . .' *United Gas Pipeline Company* vs. *Mobile Gas Service Corp., supra*, at 341." (Emphasis added.)

Under these two decisions it is clear that the Supreme Court has not construed Section 7(e) of the Act in such a manner as to grant to this Commission the power and authority to attach conditions to permanent certificates which would subject the producer-seller to permanent loss of revenues which never can be recouped. The Court did have reference to permanent certificates issued after hearing where all interested parties had ample opportunity to present the facts and circumstances justifying the price proposals and negating the necessity of price conditions. The language used certainly applies even to a greater extent to the issuance of temporary authority under Section 7(c) of the Act since interested persons have not been afforded an opportunity to present such facts and circumstances which would justify their initial price proposals (*Sunray Mid-Continent Oil Company* vs. *Federal Power Commission*, 270 F 2d 404, (10th Cir., 1959). Especially in this situation where a hearing has not been afforded

272

Petitioner, this Commission should not summarily impose a price condition which would subject Petitioner to permanent loss of revenues which never can be recouped at any future time regardless of how strong its factual presentation of justification might be.

In the CATCO Decision the Supreme Court emphasized:

"The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."

(272)

"Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipeline Company vs. Mobile Gas Service Corp.*, 350 US 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the five-month suspension provision of Section 4 and the showing of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases."

The reason that the Supreme Court held that this Commission has the power and authority to attach price conditions to

273

the *initial* price was due to the prospective effect of Section 5 proceedings. The quotation above is a definite recognition by the Court that the consumer is protected under Section 4 of the Act. Under the procedure followed by this Commission in this proceeding, no protection whatsoever has been afforded Petitioner. In striving to protect the consumer, this Commission has completely ignored any rights of Petitioner.

This Commission in exercising its power to attach reasonable terms and conditions under Section 7(e) of the Act to temporary authorizations issued under Section 7(c) of the Act should not summarily subject Petitioner to permanent loss of revenues which never can be recouped. It has the power to protect Petitioner from permanent loss of revenues and at the same time protect the consumer. In

CATCO, the Court in speaking of attaching a condition to the initial price stated:

> "... it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the *price fixed by the parties* is being determined under other sections of the Act." (Emphasis added.)

The price fixed by the parties in this proceeding is 20¢ per MCF at 14.65 psia. The price condition required by this Commission is 18¢ per MCF. Under these circumstances, how is the justness and reasonableness of the 20¢ price fixed by the

parties going to be determined under other sections of the Act? The only method by which the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act is by attaching a price condition of 18¢ for the first twenty-four hours of deliveries, with the right given to the producer-seller to increase such price to 20¢ in accordance with Section 4(d) of the Act. Under this procedure the Commission can exercise its powers under Section 4(e) and determine the justness and reasonableness of the price fixed by the parties and not subject Petitioner to the permanent loss of revenues which never can be recouped under the type of price condition attached in the Commission's letter of April 7, 1961. The action taken by this Commission violates Petitioner's rights of due process guaranteed by the Constitution since it will subject Petitioner to loss of revenues illegally which never can be recouped.

D. Commission's Order of April 7, 1961, Is Invalid Since It Is in Violation of the Federal Administrative Procedure Act.

Section 6(d) of the Federal Administrative Procedure Act, 5 USCA § 1005(d), provides:

> "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is

> self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

This Subsection is applicable to any agency proceeding, including the summary order of April 7, 1961. Since the Order fails to disclose the grounds or reasons for the denial in part of Petitioner's Application for temporary authorization, said Order is in direct violation of the Federal Administrative Procedure Act and denies to Petitioner the grounds and reasons the Commission may have had in entering such Order. To summarily deny Petitioner's request without any statement as to the reasons or grounds for such denial is also violative of the procedural due process rights of Petitioner.

III

Conclusion

Wherefore, for the foregoing reasons, Petitioner requests that this Commission grant this Application for Rehearing of the Commission's Order issued April 7, 1961, in the captioned docket; and that upon such rehearing, the Commission set aside and vacate said Order insofar as it

attaches conditions to the granting of the temporary authorization to commence sales immediately.

Respectfully submitted

HASSIE HUNT TRUST

By ROBERT W. HENDERSON
Robert W. Henderson, *Attorney*

278

(Docketed May 31, 1961)

IP NO. 3431

Docket No. CI61-1283
Hassie Hunt Trust, Operator, et al.

Hassie Hunt Trust
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Robert W. Henderson

Gentlemen:

This is with reference to your submittal of May 5, 1961 of your acceptance with certain reservations of the temporary authorization issued April 7, 1961 in the above docket and the inclusion of an amendment dated April 19, 1961 to the basic contract in purported compliance with the conditions of the temporary authorization. The agreement specifies an initial rate of 18.0¢ per Mcf, as required, but further provides for a rate of 20.0¢ per Mcf thirty days from the date of initial delivery.

The latter provision is in conflict with the intent and purpose of the rate condition attached to the temporary

authorization and your acceptance and purported compliance is hereby rejected.

Conditions of a temporary authorization should be specifically complied with and the compliance be without revised counter price adjustments which conflict with the purpose of the conditions. In order to clarify the intent of the temporary authorization issued April 7, 1961 in the captioned docket, the language of condition (1) thereto is modified to read as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per Mcf at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established.

Further, the proposed related rate increase under your FPC Gas Rate Schedule No. 28, based upon the escalation provisions of the rejected agreement of April 19, 1961 is hereby rejected and returned herewith.

Your petition for reconsideration of the aforementioned temporary authorization and removal of the conditions attached thereto has been considered with all the known facts and circumstances involved and the petition is hereby denied.

279

Service having commenced under the authorization, such service may not be discontinued without permission of the

Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. GUTRIDE
Secretary

Enclosure No. 97673

cc: Natural Gas Pipeline Company
122 South Michigan Avenue
Chicago 3, Illinois

May, Shannon & Morley
1700 K Street, N. W.
Washington 6, D. C.

OWN 5/29/61
WZ 5/29/61
5/31/61
EMM :epm
RLR 5/31/61
5-24-61

281

(Docketed January 26, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1283

FPC Gas Rate Schedule No. 28

In the Matter of:
HASSIE HUNT TRUST (Operator) *et al.*

Application for Rehearing and Reconsideration

COMES NOW HASSIE HUNT TRUST, (hereinafter referred to as Petitioner) pursuant to the provisions of Section

19(a) of the Natural Gas Act, Section 1.34 of the Commission's Rules of Practice and Procedure, and files this Application for Rehearing and Reconsideration of the Commission's Letter Order issued May 31, 1961, in the captioned docket. In support of this Application, Petitioner would show as follows:

I.

STATUS OF PROCEEDING

On February 27, 1961, Petitioner filed an Application for a Certificate of Public Convenience and Necessity requesting authority to make a sale of gas to Natural Gas Pipeline Company of America (herein referred to as Natural) in accordance with that certain Gas Sales Contract dated

282

December 15, 1960, by and between Petitioner and Natural. An emergency existed by reason of an economic hardship and Petitioner requested temporary authority to commence the sale proposed immediately.

In response to said Certificate Application and request for temporary authority, the Commission issued its Letter Order dated April 7, 1961, which designated the aforementioned Gas Sales Contract as Petitioner's FPC Gas Rate Schedule No. 28. Said Letter also granted temporary authority to commence immediately the sale proposed subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the Company within 20 days of the date hereof.

On May 5, 1961, Petitioner filed its acceptance of such temporary authorization reserving its rights to take the appropriate steps necessary to remove the aforementioned conditions and to seek permanent certificate authorization in accordance with the terms set forth in its original

Certificate Application. In compliance with the condition of said Letter Order, Petitioner submitted an Amendment to Gas Sales Contract dated April 19, 1961, between Petitioner and Natural. This contractual amendment complied with the Commission's condition by reducing the initial price to 18¢. It also provided for an escalation in price to 20¢ per MCF, 30 days after the commencement of deliveries.

Subsequently, Petitioner filed an Application for Rehearing wherein the Commission was requested to remove the conditions attached to the temporary authorization issued herein, and a Notice of Change in Rate which was based upon the escalation provision of the said Amendment dated April 19, 1961.

By Letter Order issued May 31, 1961, the Commission denied the aforementioned Application for Rehearing, rejected Petitioner's acceptance of the temporary authority, amended the conditions of its Letter Order issued April 7, 1961,[1] and rejected Petitioner's Notice of Change filing

[1] "The language of condition (1) issued in the Commission's Letter Order of April 7, 1961, is modified to read as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

based on the escalation provision of the Amendment dated April 19, 1961.

284

II.

Basis of Application

It is patently clear that the Commission erred in each action taken by its letter order issued May 31, 1961—(1) the denial of Petitioner's Application for Rehearing in Docket No. CI61-1283, (2) rejection of Petitioner's acceptance of temporary authority, (3) imposition of a condition prohibiting a rate change for duration of temporary authorization, and (4) rejection of Petitioner's Notice of Change filing. It is Petitioner's position that the Commission, in each instance, exceeded its authority under the Natural Gas Act, acted contrary to the public interest, deprived Petitioner of valuable property rights without due process of law, acted in a most unreasonable, arbitrary, and capricious manner, and grossly abused its administrative discretion. Thus, Petitioner would request that the Commission reconsider and reverse each of these actions.

With regard to the Commission's action in denying Petitioner's Application for Rehearing, Petitioner would recall to the Commission's attention the arguments set forth in Petitioner's Application for Rehearing. Such arguments concisely and cogently establish the error of the Commission's

285

action in issuing the April 7, 1961, order. Thus, those arguments will not be repeated again in this Application. This Application will direct itself toward the remaining errors which were perpetrated by said Letter Order of May 31, 1961:

1. Rejection of Petitioner's Acceptance of Temporary Authority.

2. Imposition of a condition prohibiting a rate change for duration of temporary authority.

3. Rejection of Petitioner's Notice of Change filing.

III.

Argument

A. *Rejection of Acceptance of Temporary Authority*

There is no basis for the Commission's rejection of Petitioner's acceptance of temporary authority. The acceptance specifically complies with the conditions set forth in the Commission's Letter Order dated April 7, 1961. The initial price was reduced to 18¢ per MCF in accordance with condition No. 1 of said Order. Granted, the Amendment, whereby the initial price was reduced, also provides for an additional escalation in price. However, the propriety of a subsequent price is not in issue in a Certificate proceeding under Section 7 of the Natural Gas Act. Section 4 of the Natural Gas Act affords the Commission ample opportunity

to question the just and reasonableness of any subsequent increase in price. Thus, the only price which requires any consideration by the Commission in the proceeding instituted in Docket No. CI61-1283, is the initial price. The Petitioner did exactly as the Commission requested. The initial price was reduced to 18¢ per MCF. Therefore, the Petitioner's acceptance of the temporary authority should not have been rejected. The Commission, in its Letter Order issued May 31, 1961, recognizes that the Petitioner complied with the Commission's conditions. Otherwise, there would have been no reason to amend the language of Condition No. 1.

In denying Petitioner's acceptance, the Commission states that the escalation provision of the amendatory agreement is in conflict with the "intent and purpose of the rate condition attached to the temporary authority". In reply, Petitioner would urge that the only valid "intent and purpose" for the issuance of the April 7, 1961, price condition is the protection of the gas consumer from the payment of excessive prices for natural gas pending the determination of a just and reasonable rate. If the price condition was imposed for any other reason, it was improperly imposed and therefore invalid. Petitioner submits that its acceptance is entirely

consistent with the statutory intent and purpose upon which the imposition of a price condition may be predicated. It affords the consumer all of the protection of Section 4 of the Natural Gas Act and at the same time preserves to Petitioner his statutory right to receive contract prices which are shown to be just and reasonable.

One reason for the Commission's authority to attach conditions to initial price is due to the prospective effect of Section 5 proceedings. Note the Supreme Court's explicit recognition in *Atlantic Refining Company, et al.*, vs. *Public Service Commission of the State of New York, et al.*, 70 Sup. Ct. 1246, 360 US 378 (1959) (The CATCO decision), that the consumer is protected under Section 4 of the Natural Gas Act.

> "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."
>
> "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued

interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by

contract, *United Gas Pipeline Company* vs. *Mobile Gas Service Corp.*, 350 US 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the five-month suspension provision of Section 4 and the showing of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases."

The Petitioner in complying with the Commission's original price condition executed an Agreement (which was approved by the pipeline purchaser) that would protect his right to receive his original contract price but at the same time would afford the gas consumer the refund protection of Section 4 of the Natural Gas Act. The Commission, however, has arbitrarily rejected such a proposal and attempted to impose a condition which it does not have the power to impose.

B. *Imposition of a Condition Prohibiting a Rate Change For Duration of Temporary Authorization*

The Commission in its Order of May 31, 1961, amended its original price conditions regarding the 18¢ initial price to provide as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established.

289

Petitioner submits that such an amendment merely complicates error with error. The Commission cannot, under the terms of Section 7(e) of the Natural Gas Act, arbitrarily impose price conditions for the duration of temporary authorizations. Its attempt in the present instance is therefore a flagrant abuse of its administrative discretion in the issuance of Certificate of Public Convenience and Necessity.

Section 7(e) of the Natural Gas Act provides as follows:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The public convenience and necessity surely does not require any action by the Commission which denies Petitioner or any other producer of natural gas the right to establish, collect, and justify, just and reasonable prices which have been agreed upon by Petitioner and its pipeline purchaser. Such action is a deprivation of property without due process of law. It prejudges all future increases without an opportunity to be heard and is arbitrary, capricious, and contrary to the public interest.

The power to attach conditions as broad as the one here imposed would be tantamount to the power to set rates.

290

Petitioner submits that the imposition of the proposed price condition is merely a substitution of an arbitrarily determined rate for one agreed upon by contracting parties. The Supreme Court has made clear in this regard that the Commission's function is that of reviewing rates rather than setting rates. This is clearly illustrated in *United Gas*

Pipeline Company vs. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 US 332 (1956):

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 US 338)
>
> ". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 US 343)

Also note the Supreme Court's language in *Atlantic Refining Company, et al.*, vs. *Public Service Commission of the State of New York, et al.*, 79 Sup. Ct. 1246, 360 US 378 (1959) (The CATCO decision):

> "In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.*"

291

Thus, the Supreme Court has not construed Section 7(e) of the Natural Gas Act so broad as to grant the power and authority to attach conditions which will change the pricing structure agreed upon by the parties. The Commission cannot now presume to assume such authority under the guise of conditioning initial rates.

C. Rejection of Petitioner's Notice of Change Filing

The Natural Gas Act does not give the Commission the authority to reject a Notice of Change which is in com-

pliance with all the statutory requirements and which is predicated upon a contractual agreement by the parties to the sale. Certainly Section 4 of the Act gives the Commission the power to suspend an increase in price which may be unjust and unreasonable and to hold a hearing to determine whether such increase is justified, but under no circumstances may the Commission flatly reject a Notice of Change filing which complies with all the statutory filing requirements. The statute leaves no room for administrative discretion. Thus, when Petitioner's Notice of Change was filed on May 12, 1961, the Commission had two alternatives, either accept or suspend said increase in rate. The only possible reason that the Commission could have had for returning such filing was its

292

failure to comply with the Commission's specified rules and regulations. In this instance, this was not the basis for the Commission's rejection of Petitioner's filing. Thus, the Commission's arbitrary rejection of said filing exceeds its statutory authority.

Petitioner would remind the Commission that it is entitled to the increase in price by contract whether or not the Commission accepts the Amendment dated April 19, 1961. Petitioner's Gas Sales Contract dated December 15, 1960, with its pipeline purchaser provides for an initial price identical to that proposed in the subject Notice of Change. Furthermore, any conditioning action by the Commission cannot abrogate this contractual right. The mere fact that the 20¢ price was conditioned to 18¢ does not alter the contractual obligations existing between the Petitioner and its pipeline purchaser. As a result of these contractual obligations, Petitioner has the right, under Section 4 of the Natural Gas Act, to file for an increase in price which is consistent with such contractual obligations,

and to justify, if required to do so, such proposed increase. Any doubt as to this point was resolved by *Texaco, Inc.*, vs. *Federal Power Commission*, ____ Fed. 2nd ____, (5th Cir., 1961).

293

Note the Court's language when confronted with the very same question which is posed herein:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here. El Paso has voluntarily agreed by contract to pay 20 cents initially for a period of five years. The fact that the Commission has required its producers to deliver to it at 17.7 cents does not, it seems to us, amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny to the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to. It does not follow that if producers are thereafter able to make a record in a section 4(e) proceeding that would warrant the Commission's finding 20 cents to be just and reasonable rate that the Commission would be powerless to make such a finding and approve such rate because of any contractual relations between the producers and El Paso."

Petitioner submits that the Commission's action in rejecting the subject Notice of Change is directly contra to the foregoing language. If not, why not? If the Commission's action is consistent with the Fifth Circuit in this regard, then the foregoing language means absolutely

nothing. Needless to say, the honorable court was not speaking through

294

its hat. Its pronouncement was intended to be authoritative and followed.

Of course, Petitioner's filing in this instance is much stronger than the sales which were before the Court in *Texaco, Inc.* vs. *Federal Power Commission, supra.* There the Court proposed a filing under Section 4 which was based upon an initial contractual agreement which had been conditioned. Here the Petitioner's filing is predicated upon a subsequent agreement wherein the pipeline purchaser agrees to pay as an increase in price, a rate which is consistent with the original contractual agreement that was erroneously conditioned by the Commission. Thus, Petitioner's filing in addition to having the force of the original contractual agreement has the added strength of a subsequent agreement to support Petitioner's filing. The existence of such new agreement makes more clear the arbitrary nature of the Commission's rejection of Petitioner's Notice of Change filing.

IV.

Conclusion

In summary, it is clear that the Commission has stepped beyond the limits of its statutory authority. The seriousness of such an arbitrary and capricious departure from the

295

Natural Gas Act is the confiscating effect it has upon Petitioner's property rights. In every particular, the Commission's action of May 31, 1961, reeks with confiscation! Summarily, without due process, the Commission has de-

prived Petitioner of a portion of the economic value of its gas. As may be noted in this case, from the original billing statement and comparative statement attached to the Notice of Change filing, such value amounts to a large sum of money. The tragedy of such action is in the fact that it could have been avoided. As herein suggested, the Commission could have given the consumer the same protection he now has without such a confiscatory disregard of Petitioner's property rights. Unless the Commission reverses its action, the Petitioner will be forever deprived of the revenues to which it is contractually entitled.

WHEREFORE, for the reasons set forth in Petitioner's original Application for Rehearing and Reconsideration filed in the captioned docket, Petitioner requests that the Commission reconsider the issuance of its Letter Order dated April 7, 1961, and upon such reconsideration, issue temporary authorization without conditions, and rescind its Letter Order of May 31, 1961; and, in the alternative Petitioner requests

296

for the reasons set forth hereinabove, that the Commission reconsider the issuance of its Letter Order dated May 31, 1961, and upon such reconsideration accept the Petitioner's acceptance of temporary authorization, delete the amendment to the price condition set forth in the Letter Order of April 7, 1961, and accept for filing, Petitioner's aforementioned Notice of Change in Rate; and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

HASSIE HUNT TRUST

By THOMAS G. CROUCH,
Thomas G. Crouch,
Attorney

(Docketed June 30, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1283

FPC Gas Rate Schedule No. 28

In the Matter of:
HASSIE HUNT TRUST

Supplement to Application for Rehearing and Reconsideration

COMES NOW HASSIE HUNT TRUST (herein referred to as Petitioner) and files a Supplement to the Application for Rehearing and Reconsideration filed with the Commission on June 26, 1961, wherein the Commission was requested to reconsider its Letter Order issued May 31, 1961, insofar as said Order rejects for filing Petitioner's tender of an acceptance of temporary authority and a Notice of Change in its FPC Gas Rate Schedule No. 28.

As a Supplement to said Application for Rehearing and Reconsideration, Petitioner submits the following instruments which were the subject of the Commission's Letter Order dated May 31, 1961:

1) Notice of Change in Petitioner's FPC Gas Rate Schedule No. 28.

2) Petitioner's Acceptance of Temporary Authority

Copies of said instruments are attached hereto as Exhibits "A"

and "B" respectively, and incorporated herein by reference; the above instruments are submitted for convenience

so that the Commission might have before it copies of the rejected filings.

In connection with relief requested by Petitioner's Application for Rehearing and Reconsideration, Petitioner is resubmitting under separate cover the filings which have been rejected. For the reasons set forth in its Application for Rehearing, Petitioner is confident the Commission will accept same for filing.

Petitioner again renews its request that the Commission reconsider the issuance of its Letter Order issued May 31, 1961, and accept for filing the Acceptance of Temporary Authority and the subject Notice of Change in Rate; and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

HASSIE HUNT TRUST

By THOMAS G. CROUCH,
Thomas G. Crouch,
Attorney

302

STATE OF TEXAS
COUNTY OF DALLAS

THOMAS G. CROUCH, being first duly sworn, deposes and states that he is attorney for Hassie Hunt Trust; that as such Attorney he has signed the foregoing SUPPLEMENT TO APPLICATION FOR REHEARING AND RECONSIDERATION for and on behalf of said Hassie Hunt Trust; that he is authorized so to do; that he has read the said document and is familiar with the contents thereof; and the matters and things set forth therein are true and correct to the best of his knowledge, information and belief.

THOMAS G. CROUCH
Thomas G. Crouch

(302)

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 29th day of June, 1961.

JUDY STUDEBAKER, *Notary Public, in and for Dallas County, Texas*

My commission expires June 1, 1963.

My Commission expires June 1, 1963.
[NOTARIAL SEAL]

304

(Received May 12, 1961)

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

In the Matter of:
HASSIE HUNT TRUST (Operator, *et al.*)

NOTICE OF CHANGE IN RATE

Hassie Hunt Trust (Operator), *et al.*

FPC Gas Rate Schedule No. 28, Supplement No. 2

Subject to all of the conditions, limitations and reservations hereinafter set forth, and pursuant to the provisions of Section 154.94 of the Commission's Rules and Regulations, as amended, Hassie Hunt Trust (Operator), *et al.*, (herein referred to as "Seller") hereby files, in triplicate, this Supplement No. 2 to its FPC Gas Rate Schedule No. 28.

In compliance with the provisions of Section 154.94(e), the following information is submitted with respect to this

filing. A statement of reasons, nature and basis of the change proposed herein is set forth in Exhibit "A" attached hereto and incorporated herein by reference.

(i) This change in rate is made on behalf of Hassie Hunt Trust and its co-owners whose gas may be subject to its rate

305

schedule and is intended to be a supplement to its FPC Gas Rate Schedule No. 28. The date on which the change is proposed to be made effective is May 19, 1961; therefore, it is requested that this supplement be accepted to be effective as of that date and that a waiver of the thirty-day notice requirement be granted under Section 154.98 of the Commission's Regulations.

(ii) The name of the purchaser is Natural Gas Pipeline Company of America.

(iii) Article Ninth of that certain Gas Sales Contract dated December 15, 1960, as amended April 19, 1961, which comprises the subject Rate Schedule is the contract provision authorizing the change proposed herein. This provision is quoted in the Statement of Reasons, Nature and Basis of Change attached hereto as Exhibit "A", to which reference is here made for all purposes.

306

(iv) Delivery is made under the subject Rate Schedule in the Alta Loma Area, Galveston County, Texas.

(v) The present total effective price on May 18, 1961, is 18¢ per MCF at 14.65 psia.

(vi) There are no deductions from the present price for amortization, dehydration, gathering, treating, etc.

(306)

(vii) The proposed total price to be effective May 19, 1961, is 20¢ per MCF at 14.65 psia.

(viii) There are no deductions from the proposed price for amortization, dehydration, gathering, treating, etc.

(ix) There is attached hereto as Exhibit "B" a comparative statement of sales made and revenues therefrom by months under the rate schedule effective for the twelve months immediately preceding and for the twelve months immediately succeeding the date when this change is effective. Estimates are

307

used where actual data is not available. All computations and accounting shown in Exhibit "B" are based on the volume of gas sold from the well, including royalty, attributable to the working interest of Seller.

This filing is made under the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders and without admitting that the Federal Power Commission has jurisdiction over either the undersigned Seller or the subject matter of this filing, and without prejudice to the rights of the undersigned Seller to contest the validity of said orders, and without prejudice to Seller's rights to contest the jurisdiction of the Commission over the subject matter of this filing.

If the Commission in its discretion suspends the increase in price, it is respectfully requested that the five-month suspension period be waived and that a suspension of one day only be ordered. The reasons for this request are set forth in the attached Exhibit "A".

308

Please address all communications relating to this filing to the undersigned.

Respectfully submitted,

HASSIE HUNT TRUST
By ROBERT W. HENDERSON
Robert W. Henderson

309

(Received May 12, 1961)

STATE OF TEXAS
COUNTY OF DALLAS

ROBERT W. HENDERSON, being first duly sworn, deposes and states that he is Attorney for Hassie Hunt Trust; that as such Attorney he has signed the foregoing NOTICE OF CHANGE IN RATE for and on behalf of the said Hassie Hunt Trust; that he is authorized so to do; that he has read the said Notice (including Exhibits "A" and "B") and is familiar with the contents thereof; and that the matters and things set forth are true and correct to the best of his knowledge, information and belief.

ROBERT W. HENDERSON
Robert W. Henderson

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 11th day of May, 1961.

JUDY D. HOLT, *Notary Public in and for Dallas County, Texas*

My Commission expires June 1, 1961.

311

(Received May 12, 1961)

EXHIBIT "A"

STATEMENT OF REASONS, NATURE AND BASIS FOR THE PROPOSED CHANGE

The change in rate proposed herein is supported by and in accordance with the minimum price obligations of that certain Gas Sales Contract dated December 15, 1960, as amended April 19, 1961, between Hassie Hunt Trust and Natural Gas Pipeline Company of America. Article Ninth of said contract, as amended, contains the following provisions:

> ". . . for gas delivered during the first four years of the delivery term (and any period prior to its commencement) the price shall be eighteen (18) cents for deliveries during the first thirty (30) days and twenty (20) cents during the remainder of said period; . . ."

The Gas Sales Contract dated December 15, 1960, as originally agreed upon by the parties provided for an initial price of 20¢ per MCF at 14.65 psia. The Contract was filed with the Commission together with an Application for Certificate of Public Convenience and Necessity and Temporary Authority to commence service immediately. On April 7, 1961, under Docket No. CI61-1283, the Commission granted temporary authority subject to the condition that the initial price be reduced to 18¢ per MCF at 14.65 psia. Seller was unwilling to provide for an 18¢ price during the entire first four-year period. In compliance with the Commission's condition, Seller did amend the Contract to provide for an 18¢ initial,

312

price with an escalation to 20¢ per MCF at 14.65 psia after the first thirty days of deliveries. Deliveries under

the temporary authorization commenced on April 19, 1961; therefore, the contractual increase to 20¢ per MCF is effective May 19, 1961.

For this Commission to attempt to deny Seller the right to increase its initial price to the price level agreed upon by the Seller and the Pipeline Purchaser would amount to an attempt to deny Seller revenues which Seller never could recoup. Any such attempt of the Commission would be to deny Seller due process of law and would overturn prices agreed upon by the parties and subject Seller to loss which never can be recouped, thereby depriving it of property without due process of law. The language of the Court of Appeals for the Fifth Circuit in *Texaco Inc., et al.*, vs. *Federal Power Commission*, Cause No. 18349, decided April 14, 1961, is pertinent. Such language is as follows:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here." (Page 14)

313

Under these circumstances, the consumer is adequately protected. There is no need for the Commission to suspend the increase in price for a period of five months. It is Seller's position that the 20¢ price to which the increase is being filed is a just and reasonable rate and is in the public interest.

314

(Received May 12, 1961)

EXHIBIT "B"

COMPARATIVE STATEMENT OF REVENUES AT THE PRESENT RATE AND PROPOSED RATE FOR 12 MONTHS PRIOR AND 12 MONTHS SUBSEQUENT TO MAY 19 1961

SELLER: Hassie Hunt Trust (FPC Gas Rate Schedule No. 28)
BUYER: Natural Gas Pipeline Company of America
FIELD: Alta Loma, Galveston County, Texas

YEAR	MONTH	MCF *	PRESENT RATE PER MCF 18¢	PROPOSED RATE PER MCF 20¢
1960	April	3,900	$ 702.00	$ 780.00
	May	3,900	702.00	780.00
	June	3,900	702.00	780.00
	July	3,900	702.00	780.00
	August	3,900	702.00	780.00
	September	3,900	702.00	780.00
	October	3,900	702.00	780.00
	November	3,900	702.00	780.00
	December	3,900	702.00	780.00
1961	January	3,900	702.00	780.00
	February	3,900	702.00	780.00
	March	3,900	702.00	780.00
12 months prior to April 19, 1961		46,800	$8,424.00	$9,360.00
1961	April	3,900	$ 702.00	$ 780.00
	May	3,900	702.00	780.00
	June	3,900	702.00	780.00
	July	3,900	702.00	780.00
	August	3,900	702.00	780.00
	September	3,900	702.00	780.00
	October	3,900	702.00	780.00
	November	3,900	702.00	780.00
	December	3,900	702.00	780.00
1962	January	3,900	702.00	780.00
	February	3,900	702.00	780.00
	March	3,900	702.00	780.00
12 months subsequent to April 19, 1961		46,800	$8,424.00	$9,360.00

* Estimated

315

EXHIBIT A

AMENDMENT DATED AS OF APRIL 19, 1961
TO
GAS SALES CONTRACT
DATED AS OF DECEMBER 15, 1960
ALTA LOMA FIELD, GALVESTON COUNTY, TEXAS

By this Instrument dated as of April 19, 1961, NATURAL GAS PIPELINE COMPANY OF AMERICA (Buyer) and HASSIE HUNT TRUST (Seller), parties to that certain Gas Sales Contract, Alta Loma Field, Galveston County, Texas, dated as of December 15, 1960, in consideration of the mutuality hereof, DO HEREBY COVENANT AND AGREE that said Gas Sales Contract shall be temporarily amended in the following particulars, towit:

In Paragraph 1 of Article Ninth (Price, Billing and Payment), the words:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents;"

are temporarily deleted and in substitution therefor the following words are inserted:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) the price shall be eighteen (18) cents for deliveries during the first thirty (30) days and twenty (20) cents during the remainder of said period;"

This Amendment shall be effective from the date hereof and so long as gas is delivered under the temporary authorization issued by the Federal Power Commission on

316

April 7, 1961, in Docket No. CI61-1283; provided, however, in the event the price condition attached to said temporary

authorization is changed, modified or annulled, this Amendment shall terminate. At the date of termination of this Amendment the words deleted from said Gas Sales Contract by this Amendment shall be reinstated effective as of such date as though this Amendment were never entered into.

Except as herein amended, all the terms and provisions of said Gas Sales Contract shall remain in full force and effect.

EXECUTED AS OF THE DATE FIRST ABOVE WRITTEN.

NATURAL GAS PIPELINE COMPANY
OF AMERICA

By /s/ C. E. HOLMES
C. E. Holmes
Vice President

ATTEST:

/s/ C. G. FREUND
Assistant Secretary

HASSIE HUNT TRUST

By /s/ W. H. HUNT,
W. H. Hunt, *Trustee*

APPROVED:

/s/ MURRAY HEY
Member Advisory Board

317

STATE OF ILLINOIS
COUNTY OF COOK

BEFORE ME, the undersigned authority, on this day personally appeared C. E. HOLMES, Vice President of NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation, known

to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 25th day of April, 1961.

/s/ MARGOT G. HODEL
Notary Public in and for
Cook County, Illinois

My Commission Expires November 21, 1964

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared W. H. HUNT, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purchase and consideration therein expressed and in the capacity therein stated.

GIVEN under my hand and seal of office this 19 day of April, 1961.

/s/ JUDY D. HOLT
Notary Public in and for
Dallas County, Texas

My Commission expires June 1, 1961.

318

(Received May 5, 1961)

Dallas, Texas
May 31, 1961

Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

In Account With
HASSIE HUNT TRUST
700 Mercantile Bank Building
Dallas 1, Texas

We have charged your account as follows: Bill No. 0000

Audit No.

REVISED SAMPLE BILLING

Gas delivered to you from the Hassie Hunt Trust-Marcus Jensen, et al. Unit, Alta Loma Area, Galveston County, Texas, during the month of April, 1961:

4,030 MCF @ 18¢ per MCF	$725.40

319

(Docketed July 3, 1961)

CI61-1283

HASSIE HUNT TRUST
Dallas, Texas

June 29, 1961

Federal Power Commission
441 "G" Street, N. W.
Washington, D. C.

Attention: Mr. Joseph H. Gutride, Secretary

Gentlemen:

This is with reference to your rejection by Letter Order dated May 31, 1961, of a Notice of Change in Hassie Hunt Trust's FPC Gas Rate Schedule No. 28. This Rate Schedule covers a sale of gas to Natural Gas Pipeline Company of America, from the Alta Loma Area, Galveston County, Texas.

On June 26, 1961, Hassie Hunt Trust filed an Application for Rehearing and Reconsideration of the Letter Order issued May 31, 1961. In connection with the requests made therein, Petitioner resubmits the following for filing:

1) Notice of Change in Petitioner's FPC Gas Rate Schedule No. 28.

2) Petitioner's Acceptance of Temporary Authority.

For reasons set forth in said Application for Rehearing and Reconsideration, Hassie Hunt Trust is confident that the Commission will accept same for filing.

(319)

Please stamp one conformed copy of each filing "Received" and return to us in the enclosed stamped addressed envelope.

Very truly yours,

HASSIE HUNT TRUST
By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

TGC/ca

320

(Docketed July 26, 1961)

IP No. 3501

Docket No. CI61-1283

Hassie Hunt Trust (Operator), et al.
Hassie Hunt Trust
706 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Thomas G. Crouch

Gentlemen:

This is with reference to your application for rehearing and reconsideration of the Commission's action, by letter dated May 31, 1961, in rejecting your acceptance of temporary authority granted in the captioned docket and related notice of change in rate schedule. The letter also clarified the intent of the temporary authorization that there should be no change in the initial rate for the duration of the temporary authorization except by further order of the Commission. Reference is also made to your resubmittal of such acceptance and notice of change proposing an increase in rate under such authority from 18.0¢ to 20.0¢ per Mcf. Such submittals are relative to sales of gas to Natural Gas

Pipeline Company of America in the Alta Loma Field, Galveston County, Texas.

As you were advised by our letter dated May 31, 1961, your proposal to increase the rate to 20.0¢ per Mcf thirty days from the date of initial delivery is in conflict with the intent and purpose of the price condition in the temporary authorization.

Your retender of July 3, 1961 of the proposed notice of change in rate is not in compliance with the condition of the temporary authorization issued by our letter order of April 7, 1961 in the captioned docket and is hereby rejected and returned herewith. The retendered acceptance of temporary authority with reservations is likewise in conflict with the condition therein and is also rejected and returned

321

herewith. This action denies your application for reconsideration, which duplicates, in effect, your prior application for reconsideration in the subject docket. The application is rejected and returned herewith.

By direction of the Commission.

J. H. Gutrade
Secretary

Enclosure No. 97818

(14 copies of application and one copy acceptance returned 7/28/61)

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

WZ 7/23/61
CH 7/20/61
AC 7/24/61
RLR 7/25/61
RGC
JJR:ha

322

(Docketed November 2, 1961)

100-2

FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Hassie Hunt Trust
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

The Commission has, on its own motion, reconsidered and by this letter supplements its letters of April 7, 1961, and May 31, 1961, in *Hassie Hunt Trust, Operator, et al., Docket No. CI61-1283*, relating to the temporary authorization to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America. While it felt that the reasons for its action in conditioning the temporary authorization would be understood, it has concluded, in view of recent judicial and Commission decisions, that it should attempt a more explicit exposition of those reasons in order to dispel any doubt upon your part.

On September 28, 1960, prior to the time your certificate application was filed, the Commission issued a Statement of General Policy No. 61-1 which set forth rate standards based on its experience gained in six years of regulation of independent producers. By this Statement of Policy it found that the highest price for the area wherein you are selling gas should be established at 18¢ per Mcf at 14.65 psia. It felt that you have not established in connection with the issuance of temporary authorization any sufficient reason which would justify the collection of a higher price.

Your contract calls for a price of 20¢ per Mcf with periodic escalations of 2¢ per Mcf at the end of each subsequent four-year period for the twenty-year term of the contract. It should be noted that when all aspects of the price are considered, the price you are seeking to receive for your gas would be the highest price received by any producer under certificate authorization in this area. You have cited in support of your 20¢ per Mcf price the Commission's prior decisions in *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, 24 F.P.C. 1, as amended 24 F.P.C. 106, and *Trunkline Gas Company, et al.*, 21 F.P.C. 704. In so doing you ignore the very important fact that the 20¢ per Mcf price in both of those cases was allowed only because it was a *firm* price for ten years. That is, there would be no escalation in price permitted under the contract for a ten-year period. This the Commission found in *Trunkline* to be most important, stating at 21 F.P.C. 719:

323

> Secondly, and most important, these contracts provide for a firm 20-cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20-cent price is required by the public convenience and necessity; and, *it will not be sufficient for producers hereafter seeking certification to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price.* (Emphasis added.)

The Commission reiterated the importance of this factor in its *Peoples Gulf Coast* decision where it imposed a condition upon the producer authorizations requiring that the contracts be amended to eliminate the four-year escalation provisions, substituting therefor the ten-year period pro-

vided for in the *Trunkline* contracts. That condition imposed by the order in Docket No. G-19086, *et al.*, was accepted by the applicants in that proceeding. No new reason to allow an unconditioned certificate in this proceeding was advanced in any of the filings before the Commission at the time the temporary authorization was issued.

Furthermore, the 20-cent price which was allowed in the *Peoples Gulf Coast* proceedings for the firm period of ten years is, as a result of recent court action, open to question and a "suspect" price. For in *Public Service Commission of New York* v. *F.P.C.*, CADC Nos. 15366, *et al.*, decided June 15, 1961, the Court set aside the Commission denial of intervention in those proceedings by PSC of New York. Thus, the prices there involved are still open to question. Reliance upon such a basis to establish a new and higher price line would be wholly unwarranted.[1]

Moreover, information in the Commission's records also indicates that the charging under your contract of the 20¢ rate subject to a contingent obligation to refund may have an inflationary effect upon the prices charged and to be charged by others in the area, particularly where the 20¢ rate is only the first step of a periodically rising price. Each charging may "trigger" or serve as a basis for price redeterminations at higher levels under escalation provisions in the other contracts in the area and may well trigger higher prices by producers, both those

---

[1] See, *e.g.*, *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133, 137-138 (CA5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, Oct. Term, 1961, No. 149, decided October 9, 1961.

under contract and those who will, in the future, contract to sell natural gas.[2]

It is a fundamental prerequisite to the obtaining of a certificate that an independent producer show that his proposed initial price is in the public interest. The Commission's policy and the Natural Gas Act require each application to meet minimal standards as to the price factor. The Commission has sought to announce standards which have some element of precision in our General Policy Statement. No justification has been established by you in this proceeding, either in your application for temporary authorization or in allied filings, for the establishing of a higher price than that set forth in the General Policy Statement.

Nevertheless, upon reconsideration of the Commission's action in rejecting the rate schedule supplement which you tendered for filing in this proceeding in attempted compliance with the conditions in the temporary authorization that service be commenced at an initial price of 18 cents, the Commission has determined that the filing of the supplement will be allowed, if retendered. While filing will be allowed for the express purpose of permitting there to be on file the contractual agreement between you and Natural Gas Pipeline Company of America under which you will be receiving 18¢ per Mcf, this should not be construed as permission for you to file for an increased rate pursuant to Section 4 (d) of the Natural Gas Act during the pendency of the temporary authorization. The condition in the

[2] Among existing contracts which may be triggered or for which the proposed rate may serve as a basis for a price redetermination at a higher rate are: Gulf Oil Corporation, FPC Gas Rate Schedule No. 41, Sun Oil Company (Operator), *et al.*, FPC Gas Rate Schedule No. 41, Texaco Inc., FPC Gas Rate Schedule No. 141, Pan American Petroleum Corporation, FPC Gas Rate Schedule No. 98, Hudgins Oil and Gas Company, FPC Gas Rate Schedule No. 1 and Amerada Petroleum Corporation, FPC Gas Rate Schedule No. 8.

temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4 (d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective

even though those rates might irrevocably breach the price line or trigger price increases. It has not been shown that the public interest will permit temporary authorization of the proposed sale without the condition heretofore prescribed by the Commission to prevent such consequences.

By Direction of the Commission.

Secretary

Approved by the Commission

601

(Received March 15, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1343

In the Matter of:
CAROLINE HUNT SANDS

Application for Certificate of Public Convenience and Necessity for An Independent Producer Covering a Proposed Sale of Natural Gas to Natural Gas Pipeline Company of America Chenango Field, Brazoria County, Texas and for Temporary Authority to Commence Service Immediately

Caroline Hunt Sands (hereinafter referred to as "Applicant") hereby makes application for a Certificate of Public Convenience and Necessity pursuant to the terms of Section 7 of the Natural Gas Act, as amended, authorizing the sale of natural gas hereinafter described to Natural Gas Pipeline Company of America (hereinafter referred to as "Natural").

This filing is made under compulsion of the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders, without admitting that the Federal Power Commission has jurisdiction over either Applicant or the subject matter of this Application, without prejudice to the rights of Applicant to contest the validity of said orders, and without prejudice to Applicant's rights to contest the jurisdiction of the Commission over the subject matter of this Application; but specifically reserving all rights to pursue any and all

remedies which Applicant may have relating to the asserted jurisdiction of the Commission.

In support of this Application, Applicant respectfully shows as follows:

I.

DESCRIPTION OF APPLICANT

Section 157.24(a)(1)

The exact legal name of Applicant is Caroline Hunt Sands, a natural born citizen of the United States, with her principal office and place of business at 700 Mercantile Bank Building, Dallas 1, Texas. Applicant is authorized to do business in all states of the United States.

II.

PREDECESSORS IN INTEREST

Section 157.24(a)(2)

Applicant has no predecessor in interest bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

III.

PERSONS ON WHOM PAPERS ARE TO BE SERVED

Section 157.24(a)(3)

The name, title and post office address of the persons to whom correspondence or communications in regard to this Application are to be addressed are:

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attn: Robert W. Henderson, *Attorney*
Thomas G. Crouch, *Attorney*

IV.

Sales To Be Certificated

Section 157.24(a)(4)

The purpose of this Application is to obtain a Certificate of Public Convenience and Necessity authorizing the sale of natural gas produced by Applicant to Natural under and pursuant to the terms of that certain Gas Sales Contract dated May 15, 1959, as amended, between H. L. Hunt, *et al.*, as Sellers, and Texas Illinois Natural Gas Pipeline Company, as Buyer, and ratified by Applicant in the Amendment and Ratification Agreement dated February 15, 1961. Sales to Natural under the May 15, 1959, Gas Sales Contract have been previously certificated by this Commission at an initial price of 20¢ per MCF by its Order issued July 1, 1960, under Docket Nos. G-19086, *et al.* The natural gas proposed to be sold under said Contract will be produced from lands located in the Chenango Field, Brazoria County, Texas. Applicant has been informed, and therefore states on information and belief, that Natural will transport or sell for resale in interstate commerce, such natural gas or portion thereof.

(1) All of Applicant's gas sold to Natural pursuant to said Contract will be produced from units and/or leases in which Applicant has a working interest in the Chenango Field, Brazoria County, Texas. The point of delivery to Natural will be on Natural's existing line in the Chenango Field, Brazoria County, Texas. None of Applicant's gas sold to Natural will be purchased by Applicant from third parties.

(ii) Such sale of gas does not involve the use of any of Applicant's pipelines subject to the jurisdiction of the Commission.

(iii) Applicant does not propose to serve any communities with gas either at wholesale or retail.

(iv) Applicant does not propose to deliver or sell gas to any "main line industrial customers" in this Application.

(v) The sale proposed herein does not involve the use of any major pertinent properties and facilities subject to the jurisdiction of the Commission.

V.

SUMMARY OF CONTRACT OF SALE

Section 157.24(a)(5)

In compliance with the Commission's Regulations, the following is a summary of the Gas Sales Contract which will govern the sale proposed herein, a copy of which is attached hereto as Exhibit "B-1" and incorporated herein by reference. The amendment and Ratification instrument is attached hereto as Exhibit "B" and incorporated herein by reference:

1. *Name of Seller:* Caroline Hunt Sands
2. *Name of Purchaser:* Natural Gas Pipeline Company of America
3. *Location of Sale:* Chenango Field, Brazoria County, Texas
4. *Date of Ratification:* February 15, 1961
5. *Initial Price per MCF:* 20¢ *(Including tax reimbursement)*
6. *Measurement Pressure Base:* 14.65
7. *Types of Escalation Provisions:* Periodic
8. *Hydrocarbon liquids included:* No
9. *Other Price Adjustments:* Reimbursement of new taxes

10. *Estimated Initial Volumes (MCF per day):* 1000 MCF per day

11. *Delivery Pressure:* Sufficient to enter Buyer's pipeline; not to exceed 1000 psig.

12. *Delivery Point:* Central Point on the existing line of Natural in the Chanango Field, Brazoria County, Texas

VI.

EXHIBITS

Exhibit "A"—Map

There is attached hereto as Exhibit "A" a general map or sketch relating to the proposed sale of gas described hereinabove, setting forth the general geographical location of the properties covered by this Application. Said Exhibit "A" indicates the field from which the gas is being produced and the point of delivery for the sale of such gas to Natural. Said map does not reflect the items mentioned in Subparagraphs (b), (c), (d), (e) and (f) of Section 157.25 of the Commission's Regulations since same are not applicable to the subject sale.

Exhibits "B", "B-1", and "B-2"—Instruments

There is attached to this Application as Exhibit "B" a copy of that certain Amendment and Ratification Agreement dated February 15, 1961, by and between Applicant and Natural Gas Pipeline Company of America. In addition, there is attached as Exhibit "B-1' a copy of that certain Gas Sales Contract dated May 15, 1959 by and between H. L. Hunt, *et al.*, as Sellers, and Texas Illinois Natural Gas Pipeline Company, as Buyer. There is also attached as Exhibit "B-2", a copy of that certain amendment dated August 9, 1960, to the contract

attached hereto as Exhibit "B-1". All of said instruments are incorporated herein and made a part hereof.

VII.

Temporary Authorization

Section 157.28

Applicant hereby declares his intention to invoke Section 157.28 of the Commission's Order No. 193 issued November 20, 1956, for temporary authority to begin the immediate sale of natural gas which is the subject matter of this Application. In connection therewith, Applicant states as follows:

1. The sale will be made to Natural, the Buyer, in accordance with the Amendment and Ratification Agreement attached hereto as Exhibit "B" and the Gas Sales Contract attached hereto as Exhibit "B-1" as amended by the instrument attached hereto as Exhibit "B-2".

2. An emergency exists which necessitates the sale to be commenced immediately. Some of the gas proposed to be sold is presently being flared. This waste is certainly not in the public interest. Some of the gas proposed to be sold is presently shut-in awaiting authority to sell causing an economic hardship. In view of expiration dates in the leases, it is imperative that immediate action be taken so that such gas can be sold as expediently as possible.

3. This temporary authorization does not apply to the termination of any sale or transportation or with respect to service proposed to commence more than

thirty (30) days from the date of filing this statement as required by Paragraph (c) of Section 157.28.

4. Applicant has been informed, and herein alleges, that Natural has been authorized to construct and operate such facilities as may be necessary to enable said purchaser to accept delivery of such gas from Applicant.

This Commission has previously certificated sales of gas at an initial price of 20¢ per MCF under the same Gas Sales Contract that Applicant is proposing to sell its gas. The failure to issue Applicant temporary authorization to commence sales at an initial price of 20¢ per MCF will be discriminatory as well as an abuse of the Commission's discretion and will subject Applicant to economic hardship as well as possible liability in view of such discrimination.

VII.

Facilities

Applicant's description or showing of or reference to any facilities in this Application or in any exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a Certificate of Public Convenience and Necessity for the construction or operation of such facilities. All such facilities constitute, in the opinion of the Applicant, facilities for the production or

gathering of natural gas, or both, within the meaning of Section 1(b) of the Natural Gas Act, whether or not Applicant is a natural gas company, and therefore, no Certificate of Public Convenience and Necessity is required or sought for such facilities.

WHEREFORE, Applicant respectfully requests:

That she be issued a Certificate of Public Convenience and Necessity authorizing her to make the foregoing sale of gas under the aforesaid Contract and that there be issued immediately the requisite temporary authorization to commence such sale as above requested, and Applicant hereby requests that the intermediate decision procedure be omitted and oral argument and opportunity for filing exceptions to the decision of the Commission be waived, and requests that this Application be heard under the shortened procedure.

Applicant has caused this Application to be subscribed by her duly authorized Attorney at Dallas, Texas, this 13th day of March, 1961.

Respectfully submitted

CAROLINE HUNT SANDS
ROBERT W. HENDERSON
Robert W. Henderson, *Attorney*


Caroline Hunt Sands
EXHIBIT "A"
611
DALLAS
KAUFMAN
VAN ZANDT
WOOD
HARRISON
GREGG
ELLIS
HENDERSON
SMITH
PANOLA
RUSK
NAVARRO
ANDERSON
CHEROKEE
SHELBY
FREESTONE
NACOGDOCHES
SAN AUGUSTINE
LIMESTONE
HOUSTON
ANGELINA
SABINE
TEXAS
LEON
TRINITY
FALLS
NEWTON
TYLER
JASPER
POINT OF DELIVERY TO
Natural Gas Pipeline Co. of America
BRAZOS
GRIMES
CHENANGO FIELD
HARDIN
LEE
MONTGOMERY
LIBERTY
ORANGE
JEFFERSON
AUSTIN
HARRIS
FAYETTE
CHAMBERS
COLORADA
FORT BEND
GALVESTON
LAVACA
WHARTON
BRAZORIA
JACKSON
MATAGORDA
VICTORIA
CALHOUN
LOUISIANA
SABINE RIVER

EXHIBIT B

(Received Mar. 15, 1961)

RATIFICATION AND AMENDMENT OF GAS SALES CONTRACT

WHEREAS, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY, as "Pipeline," and H. L. HUNT and THE ESTATE OF LYDA BUNKER HUNT, DECEASED, as "Seller," entered into that certain Gas Sales Contract dated May 15, 1959, which has heretofore been amended by Letter Agreements dated May 15, 1959, and March 25, 1960, and by Instruments dated February 15, 1960, and August 9, 1960, hereinafter referred to as "said contract, as amended"; and

WHEREAS, Natural Gas Pipeline Company of America, hereinafter referred to as "Pipeline," is successor in interest to Peoples Gulf Coast Natural Gas Pipeline Company, which was the successor in interest to Texas Illinois Natural Gas Pipeline Company; and

WHEREAS, all interest of the Estate of Lyda Bunker Hunt, Deceased, has been distributed to the proper devisees, which are Lyda Hunt-Margaret Trusts, Lyda Hunt-Caroline Trusts, Lyda Hunt-Bunker Trusts, Lyda Hunt-Herbert Trusts and Lyda Hunt-Lamar Trusts, and Trustees of each respective Trust being W. H. Hunt, Caroline Hunt Sands and Margaret Hunt Hill, hereinafter referred to as "said Trusts"; and

WHEREAS, Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands, and Caroline Hunt Trust Estate desire to dedicate interests owned by them in certain acreage to the performance of said contract, as amended, and to ratify said contract, as amended, and to become parties "Seller" thereto:

Now, Therefore, in consideration of the sum of Ten Dollars ($10.00) in hand paid by Pipeline to Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate, and the mutual promises

and covenants herein contained, Pipeline and H. L. Hunt, said Trusts, Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate Covenant and Agree as follows:

I

Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate hereby dedicate to the performance of said contract, as amended, upon and subject to the terms and provisions thereof, their interests in gas and gas rights, including casinghead gas, and their leasehold estates therein, and gas produced which is attributable thereto, in and under the leases and lands described in Exhibit "A-1" attached hereto and shown on the map attached hereto as Exhibit "B-1".

II

Pipeline, H. L. Hunt, and said Trusts hereby agree to Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate hereby joining, ratifying and being made a party "Seller" to said contract, as amended, with like force and effect as and to the same extent that they would have been or would be if they had executed and delivered said contract, as amended, as party "Seller" at the time of execution and delivery thereof by Pipeline, H. L. Hunt and the Estate of Lyda Bunker Hunt, Deceased, except that the obligations of Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate and Pipeline shall be effective at the date hereof.

III

Pipeline and H. L. Hunt, said Trusts, Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate do hereby amend said contract, as amended, in the following particulars, to-wit:

1. Exhibit "A-1" attached shall supplement Exhibit "A" to said contract, as amended, and Exhibit "B-1" attached shall supplement Exhibit "B" to said contract, as amended.

2. The second paragraph of Article First shall read as follows: "Seller represents that it owns certain oil and gas leases, mineral rights or interest therein and that it has the right to sell the gas (such term to include casinghead gas) produced therefrom. A list of Seller's leases, mineral rights and/or interests and a map showing the location of the lands covered thereby are attached hereto and marked Exhibit "A" and "A-1" and Exhibit "B" and "B-1", respectively, and are hereby made a part hereof."

3. The fourth paragraph of Article First shall read as follows: "Seller desires to produce natural gas from the gas reserves, gather the same to a central point on Seller's lands and leaseholds in the area shown on Exhibit "A" and, to a central point on Seller's lands and leaseholds in the area shown on Exhibit "B-1", and

may treat and/or process natural gas for the recovery and removal of certain constituents thereof; all according to the provisions hereof."

(615)

4. The first paragraph of Article Sixth shall read as follows: "1. Seller shall deliver to Pipeline the gas to be produced from the properties described in Exhibit "A" and shown on Exhibit "B" at a mutually agreeable location on such properties, and Seller shall deliver to Pipeline the gas to be produced from the properties described in Exhibit "A-1" and shown on Exhibit "B-1" at a mutually agreeable location on such properties. Title to the gas sold hereunder and responsibility for further handling thereof shall pass to Pipeline at such points of delivery."

IV

Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Sands and Caroline Hunt Trust Estate shall file, or cause to be filed, if required, an application with the Federal Power Commission for a Certificate of Public Convenience and Necessity authorizing the sale of gas pursuant to said contract, as amended, and pursue such application with due diligence. If such authority is issued which is acceptable to Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate, such authority will be forthwith accepted. Upon issuance and acceptance of such authority, the parties hereto shall undertake all acts and construct all facilities necessary to sell and deliver and to purchase and receive

616

gas hereunder. Pipeline's obligation to take or pay for gas from the parties Seller listed in this Article IV shall not commence until all such facilities have been constructed.

V

Except as herein modified, all the terms and provisions of said contract, as amended, shall remain in full force

and effect; and said contract, as amended, and as herein amended, is hereby ratified, adopted and confirmed by Nelson Bunker Hunt, Lamar Hunt Trust Estate, Caroline Hunt Sands and Caroline Hunt Trust Estate.

The terms and provisions hereof shall extend to and be binding upon the parties hereto, their successors, legal representatives and assigns.

The respective Trusts joining herein are, each, separate Trusts but with the same individuals serving as Trustees. To avoid a multiplicity of signatures, the said Trustees have signed this instrument only once, intending such signature to be effective separately for each Trust.

EXECUTED as of the 15th day of February 1961.

H. L. HUNT

By SIDNEY LATHAM,
Sidney Latham, *Agent*

LYDA HUNT-MARGARET TRUSTS

LYDA HUNT-CAROLINE TRUSTS

LYDA HUNT-BUNKER TRUSTS

LYDA HUNT-HERBERT TRUSTS

LYDA HUNT-LAMAR TRUSTS

By _____
W. H. HUNT, *Trustee*

617

By CAROLINE HUNT SANDS
Caroline Hunt Sands, *Trustee*

By MARGARET HUNT HILL,
Margaret Hunt Hill, *Trustee*

By NELSON BUNKER HUNT
Nelson Bunker Hunt

LAMAR HUNT TRUST ESTATE

By A. G. HILL,
A. G. Hill, *Trustee*

CAROLINE HUNT SANDS
Caroline Hunt Sands

APPROVED:

CAROLINE HUNT SANDS
Member Advisory Board

CAROLINE HUNT TRUST ESTATE

By .....,
Trust Officer

APPROVED:

Member Advisory Board

SELLER
NATURAL GAS PIPELINE
COMPANY OF AMERICA

By M. V. BURLINGAME
Executive Vice President
PIPELINE

ATTEST:

C. G. FREUND
Assistant Secretary

SIGNATURE PAGE TO RATIFICATION AND AMENDMENT DATED FEBRUARY 15, 1961, OF GAS SALES CONTRACT DATED MAY 15, 1959, BY AND BETWEEN NATURAL GAS PIPELINE COMPANY OF AMERICA, AS "PIPELINE", AND H. L. HUNT, LYDA HUNT-MARGARET TRUSTS, LYDA HUNT-CAROLINE TRUSTS, LYDA HUNT-BUNKER TRUSTS, LYDA HUNT-HERBERT TRUSTS, AND LYDA HUNT-LAMAR TRUSTS, NELSON BUNKER HUNT, LAMAR HUNT TRUST ESTATE, CAROLINE HUNT SANDS AND CAROLINE HUNT TRUST ESTATE AS "SELLER".

620

(Received Mar. 15, 1961)

EXHIBIT B-1

GAS SALES CONTRACT

THIS CONTRACT made as of the 15th day of May, 1959, by and between TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY, a Delaware corporation, herein called "Pipeline", and H. L. HUNT and THE ESTATE OF LYDA BUNKER HUNT, DECEASED, William Herbert Hunt, Independent Executor, acting herein severally and not jointly but for convenience hereinafter designated as "Seller";

WITNESSETH:

THAT in consideration of the sum of Ten Dollars ($10.00) paid by Pipeline to Seller, receipt of which is acknowledged, the parties agree as follows:

* * * * * * * * * *

639

ARTICLE NINTH

PRICE, BILLING AND PAYMENT

1. Pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder the prices stated as hereinafter provided: for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents; for gas delivered during the second four (4) year period twenty-two (22) cents; for gas delivered during the third four (4) year period twenty-four (24) cents; for gas delivered during the fourth four (4) year period twenty-six (26) cents; for gas delivered thereafter, twenty-eight (28) cents.

2. After deliveries of gas have commenced, Pipeline shall, on or before the twentieth (20th) day of each month, ren-

der to Seller a statement showing the quantity of gas delivered during the preceding calendar month and any adjustments made by Pipeline, and shall pay Seller the amount due for all such gas.

3. Notwithstanding the provisions of paragraph two (2) above, in the event Seller's gas is delivered hereunder commingled with the gas of others, on or before the tenth (10th) day of each month, Pipeline shall render Seller a statement showing the volume of commingled gas delivered during the preceding calendar month, and within ten days thereafter Seller shall forward or cause to be forwarded to Pipeline a statement, upon which Pipeline may rely, showing the

volume of the commingled gas attributable to Seller and the volumes thereof attributable to parties other than Seller, for the preceding calendar month, the sum of which shall equal the total volume metered by Pipeline. Within ten days thereafter Pipeline shall pay Seller the amount due for gas delivered during the preceding calendar month and shall furnish Seller with sufficient information to explain and support any adjustments made by Pipeline in determining the amount due Seller.

4. Each party hereto shall have the right at all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge computation or demand made under or pursuant to this contract. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

Article Tenth

Taxes

Pipeline shall reimburse Seller for three-fourths (¾) of any increase occurring after the date of this contract, in

the total tax paid or payable per one thousand (1,000) cubic feet by Seller and/or Seller's royalty owners, occasioned by any change in the rate, tax base, or basis of computation of the existing production or severance tax or by the imposition or substitution of any new excise tax, including sales, occupation, severance, gathering, or other taxes of like nature imposed upon Seller in respect to gas delivered under this contract.

* * * * * * * * * *

651

(Received March 15, 1961)

EXHIBIT B-2

AMENDMENT DATED AS OF AUGUST 9, 1960

TO

GAS SALES CONTRACT
DATED AS OF MAY 15, 1959
ALVIN FIELD
BRAZORIA COUNTY, TEXAS

By This Instrument, dated as of August 9, 1960, Peoples Gulf Coast Natural Gas Pipeline Company, successor by assignment to Texas Illinois Natural Gas Pipeline Company (Buyer), and H. L. Hunt and The Estate of Lyda Bunker Hunt, Deceased, William Herbert Hunt, Independent Executor, acting herein severally and not jointly but for convenience hereinafter designated as "Seller," parties to that certain Gas Sales Contract, Alvin Field, Brazoria County, Texas, dated as of May 15, 1959, as heretofore amended, in consideration of the mutuality hereof, Do Hereby Covenant and Agree that said Gas Sales Contract shall be amended in the following particulars, to-wit:

Paragraph 1 of Article Ninth shall read as follows:

"1. Pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder, the price as hereafter provided: for gas delivered during the first ten years of the delivery term (and any period prior to its commencement) twenty (20) cents; for gas delivered during the second ten years of the delivery term, twenty-three (23) cents."

658

(Docketed Apr. 25, 1961)

Docket No. CI61-1343

Caroline Hunt Sands

Apr. 25, 1961

AIRMAIL

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

Temporary authority is hereby issued to Caroline Hunt Sands to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America as proposed in Docket No. CI61-1343, subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

Your related proposed rate schedule will be considered accepted for filing upon compliance with the above conditioned authorization to be effective on the date of initial delivery subject to the provisions of Section 154.94 (c) and 154.101 of the Commission's regulations under the Natural Gas Act.

In view of the above conditions, the billing statement submitted with your filing is not applicable and accordingly is returned herewith.

The rate schedule has been designated as follows:

Description		Designation
		Caroline Hunt Sands
Ratification	2-15-61	FPC Gas Rate Schedule No. 9
Contract	5-15-59	Supplement No. 1 thereto
Supplement Agreement	8- 9-60	Supplement No. 2 thereto

657

Please advise the Commission of the date of commencement of deliveries under such rate schedule making reference in your communication to the rate schedule as designated above.

In addition, please advise the Commission as to whether you would accept permanent certificate authorization under the condition specified in (1) above. Such acceptance may permit disposition of the subject application under the abridged hearing procedure provided no protests or petitions to intervene in opposition to the application are filed.

This authorization and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require. Furthermore, once service is commenced under this author-

ization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. GUTRIDE
Secretary

Enclosure No. 84943

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
WC:ega
4-13-61

660

(Received May 22, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1343

In the Matter of:
CAROLINE HUNT SANDS

Acceptance by Caroline Hunt Sands of Temporary Authority With Reservations

CAROLINE HUNT SANDS, Applicant, filed in the captioned docket an Application for a Certificate of Public Convenience and Necessity requesting authority to sell natural gas to Natural Gas Pipeline Company of America (Natural). The Application also contained a request for temporary authority to commence service immediately. By letter issued April 25, 1961, the Commission granted temporary

authority to commence immediately the sale upon the following conditions:

1. That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.
   The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

3. Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

661

Applicant needs a suitable market for its gas; therefore, Applicant is constrained to accept, and does hereby accept the temporary authority for the sale proposed in accordance with the conditions set forth above; provided, however, that this acceptance is made without prejudice to and with the express reservations of the following rights of Applicant:

1. The rate schedule shall be temporarily amended in accordance with the instrument attached hereto as Exhibit "A" which shall be effective only so long as deliveries are made under the temporary authorization of April 25, 1961, with the same price condition therein contained.

2. Since Applicant does not believe the conditions attached to the temporary authorization are proper or reasonable, Applicant reserves all its rights to take all necessary and appropriate steps to obtain their removal by filing an Application for Rehearing and, if necessary, a Petition for Review.

3. Deliveries to Natural will be without prejudice to Applicant's rights to seek removal of the conditions, to seek an unconditional permanent certicate at 20¢

per MCF at 14.65 psia and to seek increases in the price in accordance with the rate schedule, as amended, by the instrument attached as Exhibit "A".

EXECUTED this 1st day of May, 1961.

CAROLINE HUNT SANDS
Caroline Hunt Sands
Rwh

WITNESS:
JULIE SHEERIN

662

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 1st day of May, 1961.

PEGGY J. GIBBENS
Notary Public in and for
Dallas County, Texas
[NOTARIAL SEAL]

My Commission expires June 1, 1961.

665

(Docketed May 22, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1343

In the Matter of:
CAROLINE HUNT SANDS

Application for Rehearing and Reconsideration

COMES NOW, CAROLINE HUNT SANDS (hereinafter referred to as Petitioner) files this Application for Rehearing and

Reconsideration of the Commission's Letter Order issued April 25, 1961, in the captioned docket. In support of this Application, Petitioner would show as follows:

I.

STATUS OF PROCEEDING

On March 15, 1961, Petitioner filed an Application for a Certificate of Public Convenience and Necessity requesting authority to make a sale of natural gas to Natural Gas Pipeline Company of America (hereinafter referred to as Natural) in accordance with the terms of that certain Amendment and Ratification Agreement dated February 15, 1961, between Petitioner and Natural. An emergency existed by reason of the gas being flared, and Petitioner requested temporary authority to commence the sale proposed by said Certificate Application immediately.

In response to said Certificate Application and request for temporary authority, the Commission issued its Letter Orders dated April 25, 1961, which designated said Ratification Agreement dated February 15, 1961, that certain Gas Purchase Contract dated May 15, 1959, by and between H. L. Hunt, et al., and Texas Illinois Natural Gas Pipeline Corporation, and that certain supplemental agreement dated August 9, 1960, by and between the same parties as Petitioner's Gas Rate Schedule No. 9 and Supplement Nos. 1 and 2 thereto respectively. Said letter also grants temporary authority to commence the sale proposed immediately subject to the following conditions:

1) That the total initial price therefor shall not exceed 18¢ per MCF at 14.65 psia.

2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and revised billing statement.

3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

By telegram dated May 11, 1961, Petitioner requested an extension of the 20 day period. In response to this request, an extension was granted by the Commission to and including May 26, 1961.

II.

Statement of Issue and Facts

The sole issue which the Petitioner would now raise is whether the price condition attached to the temporary authorization issued herein is justified. It is the position of the Petitioner that an analysis of the facts surrounding the sale proposed will conclusively establish the necessity of an unconditioned temporary authority. Thus, the Petitioner would suggest that the Commission review its action in issuing its Letter Order dated April 25, 1961, in the light of the following uncontroverted facts and after such review issue *without condition* the temporary authority requested by Petitioner in its original Certificate Application.

1. The sale proposed by Petitioner is to be made under terms identical to a sale permanently certificated without condition by *H. L. Hunt, et al.*, Docket No. G-19086, *et al.* In fact, Petitioner merely ratified the Gas Purchase Contract which was the subject of the proceeding in Docket No. G-19086, *et al.* Thus, the sale proposed by Petitioner might be described as being made under the terms of a contract already found to satisfy the requirements of the public convenience and necessity.

2. The sale which was the subject of the proceedings in Docket No. G-19086, *et al.*, was certificated without condition, not after a so-called "franny" or shortened proceeding but after a formal hearing in which parties from all segments of the natural gas industry—producers, transporters, and consumers—vigorously participated. The certification of this sale is not now subject to review and therefore cannot be characterized as being "suspect".

3. The Commission has also permanently certificated the sale of gas produced in the same general area by *Phillips Petroleum Corporation*, in Docket Nos. G-15471 and G-15472, which provides for an initial price identical to the initial price proposed herein by Petitioner. In this proceeding the initial price was shown to be in the public interest and consistent with the requirements of the public convenience and necessity.

4. Although the initial price of the sale proposed by Petitioner is identical to the foregoing permanently certificated sale by Phillips Petroluem Corporation, an important distinction exists which must be considered in equating the two sales. The point of delivery under the sale by Phillips will be at the wellhead while the point of delivery of the sale

proposed by Petitioner will be at a central point in the field. The significance of this distinction is that Petitioner, not the consumer, will bear the expense of gathering the gas (1¢ to 4¢ per MCF), thus reducing Petitioner's income from the subject gas to below 20¢! (See Exhibit "A" attached hereto and incorporated herein for all purposes.)

5. The gas sold by Petitioner when considered with the surrounding area is only a small portion of a large volume of gas which has been previously dedicated and certificated under terms identical, or less favorable to the consumer, than the sale proposed by Petitioner. The Commission has previously stated that the imposition of a price condition in such circumstances is "anomalous, unreasonable and illogical". (In the Matters of *Allegheny Land and Mineral Company*, Docket No. G-19030.)

670

III.

BASIS FOR THIS APPLICATION

It is Petitioner's position that there is no reasonable predicate upon which a price condition to the sale proposed herein can be based. The sale proposed will be made in Brazoria County, Texas, Railroad Commission District No. 3, an area in which other sales have been permanently certificated without condition at the same price and under terms essentially identical to the one which Petitioner proposes herein. The imposition of a condition under such circumstances is contrary to the public interest, violative of the Natural Gas Act and the Federal Administrative Procedure Act, and completely disregards the protection against deprivation of property without due process of law guaranteed by the United States Constitution. Specifically, Petitioner would urge that the Commission erred in the issuance of its Letter Order dated April 25, 1961, for the following reasons:

1. The Commission's action exceeds the authority granted to the Commission by the Natural Gas Act to attach such reasonable terms and conditions to the

issuance of certificate authorizations as the public convenience and necessity may require.

2. The Commission's action will cause Petitioner to suffer irreparable damage and results in a deprivation of Petitioner's property without due process of law.

3. The Commission's action is discriminatory and inconsistent with the uncontroverted facts which overwhelmingly support the issuance of unconditioned authority.

4. The Commission's action in attaching the aforementioned price condition is unreasonable, arbitrary, capricious, and an abuse of the Commission's administrative discretion.

5. The Commission's action is violative of the Federal Administrative Procedure Act in that it fails to disclose the grounds or reason for the denial in part of Petitioner's Application for temporary authorization.

IV.

Argument

1. *The Commission's action exceeds the authority granted to the Commission by the Natural Gas Act to attach such reasonable terms and conditions to issuance of certificate authorizations as the public convenience and necessity may require.*

Even if we assume the Commission's authority to impose conditions is as broad in the issuance of temporary authorizations as in the issuance of permanent certificates, the attachment of a condition in the instant proceeding far exceeds the authority granted by the Natural Gas Act. The only source

of authority to impose any condition must be traced to the following language contained in Section 7(e) of the Natural Gas Act:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." (56 Stat. 84 (1942); 15 U.S.C. § 717 f (e)

The attachment herein of a price condition instead of being in a category of "reasonable" smacks on its face as being unreasonable. The broadest imagination cannot, in view of the facts surrounding the proposed sale, conceive of the price conditions set forth in the Commission's Letter Order issued April 25, 1961, as being "reasonable" or "required by the public convenience and necessity". Certainly the foregoing statutory language cannot be taken as authority for the proposition that the Commission may attach any condition that it may desire.

Further, the courts have not construed the statutory authority so broad. This provision was first construed as being applicable to independent producer certificates in the Signal Oil Decision.[1] It is pertinent to consider the language of the Court as it reviewed the Commission's exercise of its

price conditioning authority:

> "The question of the rate to be fixed as a condition to the granting of the certificate was gone into at length in the proceedings before the Commission. The record shows that *at the time of the proceedings all other*

---

[1] *Signal Oil and Gas Co.* vs. *Federal Power Commission*, 283, F. 2nd 771 (Third Cir., 1957), Cert. denied 363 U.S. 923).

sales in the area were at 10 cents or less; the average rate was 9.9 cents. There was evidence introduced by the intervenors that *an increase in price paid by one purchaser would increase the market price in the whole area, and if Signal received 12 cents, the market price would rise to 12 cents* to the great expense of the ultimate consumers. *Signal offered no evidence to justify the reasonableness of the proposed 12 cent rate,* nor did it claim that the 10 cent rate was confiscatory. Under the circumstances, substantial evidence supports the Commission's finding that public convenience and necessity required the certificate to be conditioned on a 10 cent rate."

Note the Court's emphasis upon the fact that all other sales in the area were at prices less than prices in question, and further that the certification of the proposed price would cause a rise in market price to the great expense of the ultimate consumer. Contrast these facts with the facts surrounding the sale herein involved. Granted, a record of evidence has not been established in this case, but the Commission can certainly take administrative or judicial notice of the non-applicability of either of these facts in the instant proceeding. There are other sales equal to, and greater than the price proposed by Petitioner, and, since the foregoing is true, the certification of Petitioner's price can have little effect upon the market price.

674

Consider further, *Atlantic Refining Company, et al.,* vs. *Public Service Commission of the State of New York, et al.,* 79 Sup. Ct. 1246, 360 U. S. 378 (1959) (CATCO), which stands as authority for the proposition that in a proper case the Commission can impose a condition as to price. In deciding this case, the Supreme Court states as follows:

"Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a perma-

nent certificate should not be issued." (Page 390).

. . .

"Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in triggering of general price rises or an increase in the applicants existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." (Page 391)

Certainly the price proposed by Petitioner cannot be described as being out of line or one which might result in general price rises. It is utter folly to suggest that Petitioner's Certificate Application signals a situation in which the proposed price is not in keeping with the public interest. In fact, the reverse is true. Does it not seem highly illogical and unreasonable to attach a price condition to a sale proposed under a contract which has already survived the close scrutiny of a full fledged certificate proceeding, and which has already been determined to satisfy requirements of the public convenience and necessity?

2. *The Commission's action will cause Petitioner to suffer irreparable damage and will be tantamount to a deprivation of Petitioner's property without due process of law.*

The Commission's action in issuing its Order of April 25, 1961, has the effect of depriving Petitioner the right to receive moneys to which it is contractually entitled to receive. Under these circumstances there is no possibility of recoupment, even though the prices proposed by Petitioner may be subsequently found to be "just and reasonable". Certainly the Commission is under an obligation to protect the rights of the gas consumer, but in so doing

the Commission cannot completely ignore the rights of Petitioner. In direct contradiction of the Natural Gas Act, the Commission's actions would, in effect, determine a new rate at which Petitioner may sell its gas completely disregarding the rates as determined by the Petitioner and its pipeline purchaser. Attention is directed toward *United Gas Pipeline Company* vs. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 US 332 (1956), the Supreme Court stated:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts."

Note also *Atlantic Refining Company, et al.*, vs. *Public Service Commission of the State of New York, et al.*, 79 Sup. Ct.

1246, 360 US 378 (1959) (The CATCO decision):

> "In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.* Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate."
>
> . . . .
>
> "And Section 7 is given only that scope necessary for 'a single statutory scheme under which *all rates are established initially by the natural gas companies*, by contract or otherwise, and all rates are subject to being modified by the Commission . . .' United Gas Pipeline Company vs. Mobile Gas Service Corp., supra, at 341." (Emphasis added.)

It seems clear from the foregoing that the Supreme Court has not construed Section 7 of the Natural Gas Act as giving the Commission in its exercise of its conditioning powers, a blanket authority to set rates. This prerogative has been left exclusively to the natural gas companies involved. However, this is precisely what the Commission has done by its Letter Order of April 25, 1961, apparently under the guise of protecting the interest of the consumer. It is clear of course, that the facts surrounding this sale do not support the consumer's need for protection, but let us assume for purposes of argument, that they did. The Commission could have given the consumer the same protection that was ostensibly given herein without an invasion into the area of

677

rate setting and without the imposition of irreparable harm upon Petitioner.

Would it not be more logical and appropriate to follow a course of action in the issuance of temporary authorizations which protects both the consumer and the producer. Certainly the Supreme Court has recognized with favor in its *CATCO* decision the protection afforded to the consumer under Section 4 of the Natural Gas Act. If the safeguards under Section 4 are sufficient protection for the consumer, Petitioner would suggest that the Commission could have devised a conditioning procedure in the instant proceeding which would have afforded the consumer safeguards similar to those set forth under Section 4 without depriving Petitioner of valuable property rights. For example, the Commission could have permitted the Petitioner to collect its proposed initial price with an obligation to refund such portion of that price in excess of 18¢ per MCF which may later be found to be unjustified in the permanent certificate hearing. If such had been

done the consumer would have had the same protection he now has under the Commission's Order issued April 25, 1961, and the Petitioner would not have been denied the right to receive its contract price without the due process of law. Thus, both consumer and Petitioner would have been protected and the Commission could have avoided invading the area of price setting reserved exclusively to the parties.

The effect of the Commission's Order of April 25, 1961, is tantamount to the taking of Petitioner's property without due process of law. This disastrous result could have been avoided while at the same time affording adequate protection to the natural gas consumer. The Commission has pre-empted the Petitioner's exclusive right of rate determination and summarily deprived the Petitioner of valuable property rights without a hearing, both of which are violative of the due process of law guaranteed by the United States Constitution.

3. *The Commission's action is discriminatory and inconsistent with the uncontroverted facts which overwhelmingly support the issuance of unconditioned certificate authority.*

The Commission has heretofore established that a policy of fairness and equality should be followed in the exercise of its powers under the Natural Gas Act. This was expressed in the *Reef Fields* Case (19 FPC 351):

> ". . . we conclude now that it would be inequitable, unfair, and unduly discriminatory to continue the suspension of the rate increase sought. *Mindful of our responsibility to treat those similarly situated with equality consonant in the premises, we think it is proper and in the public interest that we, upon our own motion, vacate the suspension, accept the rate*

change for, filing, and terminate this proceeding." (Emphasis added).

This policy was further recognized by the Commission in its Opinion No. 310 issued April 4, 1958, In the Matters of *Pan American Petroleum Corporation, et al.*, Docket Nos. G-8549, *et al.*, (19 FPC 463):

679

"Finally considering all of the circumstances in this case including, *inter alia* . . . that we have been allowing higher rates to go into effect without suspension and with no more justification than has been shown here, we conclude that it would be grossly inequitable to deny the proposed increase in rates." (19 FPC 472) "We have permitted numerous increases in this area to what we have felt was the prevailing field price . . . For us now to require further proceedings would amount to undue discrimination on our part against these rate proponents." (19 FPC 474).

In the instant proceeding the Commission has certificated other producer sellers to make sales of natural gas produced in the same general area and at the same price proposed by Petitioner. Thus, the Commission's Order of April 25, 1961, would apparently indicate a deviation from the Commission's previously established policy of fairness and equality. Certainly it goes without saying that any procedure which would certificate other producers without condition and impose a condition upon Petitioner is discriminatory and violative of the purpose and spirit of the Natural Gas Act. Such is bluntly an abuse of administrative discretion. It is preposterous to require that Petitioner reduce its initial price from 20¢ per MCF to 18¢ per MCF when this Commission has permanently certificated many 20¢ prices in the same area after full and complete formal hearings. Especially is this true when in one instance the Commission has permanently certifi-

cated the very contract under which Petitioner now proposes to sell its gas. The Commission has previously

recognized the impracticability of having two different prices in the same area for sales of gas made under similar circumstances. The resulting detriment to the public interest can be readily seen. In its Opinion No. 340, issued January 27, 1961, In the Matters of United Carbon Company, *et al.*, Docket Nos. G-9572, *et al.*, (_____ FPC _____) the Commission stated as follows:

> "Since the cost evidence supports Columbian Fuel's rate of 26 cents per MCF to United Fuel, for sales of gas from eastern Kentucky, United Carbon should not be required to charge a lower rate for similar sales to the same customers from the same area. Any such difference in our opinion, would tend to discourage production of gas by United Carbon and would not be in the public interest." (Page 11 of mimeographed Opinion).

The Commission has further elaborated upon this in its most recent Order issued May 2, 1961, In the Matters of Allegheny Land and Mineral Company, Docket No. G-19030 by stating as follows:

> ". . . It would be anomalous, unreasonable, and illogical to deny the rate increase for the sales of the relatively insignificant volumes involved in the proceeding, where as here, the greater part of the gas sold under the contract has been newly dedicated to that contract at a higher rate to the producer. In our opinion, the establishment of the 28 cent per MCF rate for all gas sold under the contract will encourage exploration and development."

Surely the Commission will be most anxious to correct this most flagrant departure from a well-founded policy of fairness and equality.

4. *The Commission's action in attaching the aforementioned price condition is unreasonable, arbitrary, capricious, and an abuse of the Commission's administrative discretion.*

The Commission's action in attaching a condition to the sale proposed by Petitioner becomes ludicrous when an attempt is made to rationalize the action with reason: The Commission has, in effect, conditioned a price to a level below that which is required by the public convenience and necessity. It is redundant to state that such action is arbitrary and capricious.

This is illustrated by the Commission's recognition of the current competitive level of price for the subject area in its *Trunkline Opinion* wherein the Commission states:

> "The record contains uncontradicted testimony that the current competitive level of prices in Brazoria and Galveston Counties is 20 cents per MCF, and that the demand for gas for intrastate uses in this highly industrialized area at this price is so great that Trunkline would not be able to buy any significant reserve at lower prices." (21 FPC 718)

In this same Opinion it is significant to note the Commission's statement concerning the predominate price for natural gas during the period prior to the year of 1959:

> "The field price evidence in this proceeding thus indicates a pattern of prevailing prices for the Texas Gulf Coast area in the range of 17.5 to 21.5 cents per MCF, and within this range the price of 19.5 cents per MCF appears predominate. If we were to rely upon this evidence alone, we would be inclined to condition the initial price for the proposed Texas sales at 19.5 cents per

> MCF. However, there are other considerations here which lead us to conclude that these sales should be

certificated at the contract price of 20 cents per MCF." (21 FPC 718, 719).

Assuming, for purposes of argument, that a price condition of 19.5¢ per MCF was proper in May of 1959, the date of the *Trunkline Opinion*, it is obvious that a price of 20¢ per MCF in 1961, does not signal the existence of a situation which is ostensibly contrary to the public interest. The general increase in cost of engaging in the gas producing business during this interim has been much greater than such a slight increase in price.

The seriousness of the imposition of the condition in the instant proceeding is further accentuated when we consider the significant circumstances surrounding the delivery of the subject gas. The Commission in its Trunkline Opinion was concerned with a wellhead delivery sale. In this case the Petitioner must bear the expense of gathering the gas to a central point in the field at a cost of between 1 and 4 cents per MCF. (See Exhibit A) Thus, if we make allowance for this additional cost which will be borne by the producer and not the consumer, at best the Petitioner will net only 19¢ per MCF for its gas and it is very likely that in some situations the Petitioner will not receive more than 16¢ per MCF. So, here we have the anomalous situation of the Commission on the one hand determining that one group of producers is entitled to 20¢ per MCF, exclusive of gathering costs, while Petitioner

under similar circumstances is entitled to only 16-19¢ per MCF. The Commission has previously recognized differences in conditions of delivery as a proper factor for consideration in determining whether a proposed price is out of line. In Opinion No. 335, *El Paso Natural Gas Company*, Docket No. G-13862, *et al.*, issued February 23, 1960, the Commission states:

"The *CATCO* case indicates that a matter of important concern is whether or not the proposed price is 'out of line', a question calling for a comparison of the proposed price with prices for other, comparable producer sales to the pipeline companies, applicant and to other producers. In making such comparisons, *due regard should be given such factors as* extent of reserves, quality of gas, *conditions of delivery*, extent of processing, and the like." (Page 8) (Emphasis added).

Further in its Order issued August 10, 1959, In the Matter of *J. M. Huber Corporation*, FPC Docket No. G-13800, (mimeograph Pages 4 and 5) the Commission stated:

"If this 2.71¢ per MCF is deducted from the 16.0¢ per MCF figure, we arrive at a wellhead price of 13.29¢ per MCF for this unpressurized gas."

"We take administrative notice of the fact that we have certificated many of these sales and that the prices for such sales were wellhead prices for the gas and not the price of gathered gas."

In these cases, the Commission has considered the differences in the price of gas delivered at the wellhead and the gas delivered at the central point in the field, and has recognized that the two prices are not comparable. The Petitioner would suggest that the same reasoning applied to the sale herein proposed would justify a price of 21-24¢ per MCF

inclusive of gathering cost. Contrast that, however, with Petitioner's request for merely a 20¢ price, inclusive of gathering cost. Surely if the producers involved in the *Trunkline* case were entitled to 20¢ per MCF exclusive of gathering cost, the Petitioner should be entitled to 20¢, inclusive of gathering cost. It should be remembered that the *Trunkline* decision is now firm and final. The prices involved therein have been approved on the merits of

review. Certainly it seems impossible to understand any necessity of a price condition under these circumstances.

In addition to certification of the sales to *Trunkline* at initial prices of 20¢ per MCF, the Commission in its Order issued July 1, 1960, in *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, (24 FPC 1) in Docket Nos. G-19086, *et al.*, issued permanent certificates to *Hassie Hunt Trust*, Docket No. G-19115, and *Placid Oil Company*, Docket No. G-19125, at initial prices of 20¢ per MCF at 14.65 psia. The very contract under which Petitioner now proposes to make its sale was involved in this proceeding. The paramount issue therein as stated by the Commission was:

> "The issues which are presented in these proceedings are . . . (4) whether the independent producers have demonstrated that the public convenience and necessity require the sale of natural gas by them and, if so, at what initial price such sales have been justified." (24 FPC 2)

The Commission concluded that the sales were required by the public convenience and necessity and as a result certificated the sales at the proposed initial price of 20¢ per MCF. Although the Commission's denial of an intervention in that case is now subject to review, the issuance of the certificate is not subject to review. Thus, the very same contract here involved, has been permanently certificated without condition. Does this fact support the imposition of a price condition to the Petitioner's sale? Certainly not; to the contrary, it establishes a presumption in favor of the issuance of temporary authority without condition. In any event, there is absolutely no justification for requiring a 2¢ reduction in the price proposed by Petitioner. The Commission in so acting has summarily, without hearing, dis-

criminated against Petitioner and abused its administrative discretion.

5. *The Commission's action is violative of the Federal Administrative Procedure Act in that it fails to disclose the grounds or reason for the denial of Petitioner's Application for temporary authorization without condition.*

Section 6(d) of the Federal Administrative Procedure Act, 5 USCA § 1005 (d) provides:

> "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

This Subsection is applicable to any agency proceeding, therefore applies directly to the Commission's summary order of April 25, 1961. Since the Order fails to disclose the grounds and reasons for the denial, in part, of Petitioner's request for temporary authority, the Order is in direct violation of the Federal Administrative Act. The Commission has denied Petitioner the right to know the grounds or reason if there by any, upon which the Commission's action of April 25, 1961, was based. To deny Petitioner's request in such manner is violative of the procedural due process rights of Petitioner.

V.

Conclusion

Wherefore, for the foregoing reasons Petitioner requests that the Commission grant this Application for Rehearing and Reconsideration of its Order issued April 25,

1961, in the captioned docket; and that upon such reconsideration, the Commission set aside and vacate said Order insofar as it imposes conditions to the issuance of the temporary authorization to commence the sale proposed by Petitioner immediately. Petitioner requests such other and further relief to which it may be entitled in the premises.

Respectfully submitted,

CAROLINE HUNT SANDS
By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

689

(Received May 22, 1961)

EXHIBIT A

GAS GATHERING AGREEMENT

THIS AGREEMENT, dated the 15th day of February, 1961, by and between GAS RESOURCES CORPORATION, a Texas corporation, and THOMAS J. ALEXANDER, hereinafter jointly and severally referred to in the neuter singular as "Resources", and NELSON BUNKER HUNT, LAMAR HUNT TRUST ESTATE, CAROLINE HUNT SANDS and CAROLINE HUNT TRUST ESTATE, acting herein severally and not jointly, but for convenience hereinafter referred to collectively in the neuter singular as "Producer";

WITNESSETH:

WHEREAS, Producer represents that it is the owner of certain oil, gas and mineral leases covering certain lands or interests in lands located in or near the Chenango Field, Brazoria County, Texas, such leases being described on Exhibit "A" attached hereto and made a part hereof, which leases are presently producing oil and low pressure

casinghead gas, such casinghead gas being hereinafter sometimes referred to as "gas"; and.

WHEREAS, Producer also represents that it is the owner of additional oil, gas and mineral leases covering certain lands or interests in lands located in near the aforesaid Chenango Field, such leases being described in Exhibit "B" attached hereto and made a part hereof, upon which are located those certain gas wells known as the Mary McDaniel, et al. Well #1 and the L. D. Vieman #1 Well, and such wells are productive of high pressure gas well gas; and

WHEREAS, Producer further represents that it has ratified a Gas Sales Contract dated May 15, 1959, as amended, between H. L. Hunt, et al., and Natural Gas Pipeline Company of America (hereinafter designated as "Gas Purchaser") for the sale of the gas produced from or allocated to the leases described in Exhibits "A" and "B" respectively and desires to deliver the gas subject to such Contract to Gas Purchaser at a central point in the Chenango Field; and

WHEREAS, Resources proposes to install a gas gathering and compression system in the Chenango Field to gather the casinghead gas produced on Producer's leases, to compress such gas, and to make delivery thereof to the Gas Purchaser for the account of Producer, and to install a gas gathering system to gather the gas well gas produced from the gas wells referred to above and make delivery thereof to the Gas Purchaser for the account of Producer.

690

NOW, THEREFORE, in consideration of the sum of ten dollars ($10.00) paid by Resources to Producer, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual covenants and agreements

herein contained, Resources and Producer hereby covenant and agree as follows:

I.

A. Subject to all the terms and conditions of Producer's Gas Sales Contract with its Gas Purchaser, Producer agrees to deliver to Resources all casinghead gas produced from or allocated to the leases described on Exhibit "A" during the term hereof within the limits specified in Producer's Contract with its Gas Purchaser, except only such gas as is necessary to operate efficiently Producer's leases, including, but not limited to, lease fuel, gas lift gas, repressuring or pressure maintenance in the Chenango Field, and to fulfill Producer's obligations to its lessors under the provisions of the leases covered hereby. Resources agrees to compress such gas and deliver the same to Gas Purchaser for the account of Producer in accordance with the terms and conditions hereinafter set forth.

B. Subject to all the terms and conditions of Producer's Contract with its Gas Purchaser, Producer agrees to deliver to Resources all gas well gas produced from or allocated to the wells on the leases described in Exhibit "B" during the term hereof, which Producer shall be required or have the right to deliver to Gas Purchaser, and Resources agrees to deliver the same to Gas Purchaser for the account of Producer, but shall be under no obligation to compress such gas well gas unless and until Producer and Resources reach a mutually agreeable basis of settlement therefor.

C. It is recognized by the parties hereto that certain of the wells located on the properties covered hereby are being operated by Producer primarily for the production of oil; and, therefore, any of the terms of this Contract to the contrary notwithstanding, Resources' rights hereunder shall be subservient to said oil operations. Producer may

at any time, without liability to Resources, clean out, deepen or abandon any well or wells on the property covered hereby or use any efficient modern or improved method for the production of oil. Before any well or wells are taken out of service for any reason, Producer shall, at its own risk and expense disconnect such wells from Resources' gathering system. Further, Producer specifically reserves the right to introduce air, gas or any other extraneous substances into the wells covered hereby

or into the formation or formations from which said wells are producing, when in the judgment of Producer the induction of such substance is desirable in the operation of such wells for the production of oil, even though such wells may be partially or entirely destroyed as producers of casinghead gas. In the event Producer's operations in this connection create a condition which in the judgment of Resources makes the gathering of casinghead gas from any well unprofitable to Resources or should such operation tend to endanger the facilities or property of Resources or Resources' employees, then Resources reserves the right to discontinue gathering casinghead gas from the well or wells affected.

II.

Resources shall commence the construction of the necessary gathering and compression system on or before thirty (30) days from the date of execution hereof by Producer and prosecute such construction diligently and in a good and workmanlike manner until completion and shall commence the taking of gas immediately upon the completion of the system.

III.

Delivery of Producer's casinghead gas to Resources shall be at the outlet side of Producer's oil and gas field sep-

arators at or adjacent to the wellheads of the wells subject hereto, and delivery of Producer's gas well gas to Resources shall be at the wellhead. The volume of gas so delivered by Producer to Resources shall be measured at the delivery points and shall be considered the volume of gas delivered to the Gas Purchaser for the account of Producer during each accounting period, except that Resources is granted the free use of Producer's pro rata share of such volumes of gas as are actually consumed as compressor fuel and except as otherwise provided in Article IX hereof. The casinghead gas so delivered, after being measured at the point of delivery, may be commingled by Resources with other low pressure gas gathered by it in the field and the commingled stream shall be compressed to a pressure sufficient to make delivery to the Gas Purchaser but not in excess of one thousand (1,000) psig; provided, however, the gas shall not be commingled with gas which would render the commingled stream unmerchantable under the terms of Producer's contracts covering the sale of such gas, in effect from time to time.

692

IV.

A. Resources shall install or cause to be installed, maintained and operated suitable orifice meters and any other auxiliary measuring equipment necessary to accomplish accurate measurement of all gas delivered into its gathering system. Such measurement equipment shall be installed and operated in accordance with the specifications of Gas Measurement Committee Report No. 3 of the Natural Gas Department of the American Gas Association, as amended from time to time, or by any other method mutually agreed upon between the parties.

1. For purposes of measurement and meter calibration, the atmospheric pressure shall be assumed to be

constant at fourteen and seven-tenths (14.7) pounds per square inch absolute.

2. The value of the Reynolds number factor and the expansion factor shall be assumed to be one (1).

3. The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature of sixty degrees (60°) Fahrenheit and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute pressure as defined in the Standard Gas Measurement Law of the State of Texas.

4. The specific gravity of the gas delivered hereunder shall be determined quarterly by Resources by means of an Acme or similar type gas gravity balance, or by such other method as is mutually agreed upon between the parties.

5. The flowing temperature of the gas shall be determined by an indicating thermometer.

B. The accuracy of Resources' meters and auxiliary measuring equipment shall be verified at necessary intervals and at least once each month in the presence of representatives of both parties, and the calibration and adjustment of such measuring equipment shall be jointly observed by such representatives. Upon request by either party for a special test of any meter or auxiliary measuring equipment, the other party agrees to cooperate in securing immediate verifications of the accuracy of such measuring equipment and joint observation of any adjustments to be made thereon. Advance notice of the time of each test shall be given by Resources to Producer in order that Producer may conveniently have his representative present to

witness such test. In the event that Producer's witness is not present at the scheduled time of the test, Resources will, nevertheless, make such test and furnish Producer with a copy of the results thereof.

V.

Producer agrees to pay Resources for its services a sum equivalent to four cents (4¢) per thousand cubic feet of casinghead gas compressed and delivered by Resources to the Gas Purchaser for the account of Producer as determined under Article III above, and agrees to pay to Resources for its services a sum equivalent to one cent (1¢) per thousand cubic feet of gas well gas delivered by Resources to the Gas Purchaser for the account of Producer as determined under Article III above.

VI.

Resources shall not be obligated to process or sweeten the gas but shall be required to dehydrate the gas for the removal of water vapor present therein in a vapor state so that such gas shall contain not more than seven (7) pounds of water vapor per million cubic feet, and further shall be required to make delivery to Gas Purchaser at temperatures not in excess of one hundred and twenty degrees (120°) Fahrenheit or such higher maximum temperatures as the Gas Purchaser may specify. Any liquid hydrocarbons from the gas delivered hereunder deposited in Resources' system as a result of the gathering and compression of such gas shall, if recovered, be the property of Resources; but Resources shall have no right to process Producer's gas for the recovery of the liquefiable hydrocarbons contained therein unless and until a written agreement is executed between Producer and Resources relating to the same.

VII.

This Agreement shall be effective from the date hereof and shall continue and remain in full force and effect for a primary term of twenty (20) years from the date of first delivery of gas hereunder and shall continue in force and effect thereafter for successive periods of one (1) year each unless and until terminated either by Producer or Resources upon twelve (12) months prior written notice to the other party.

VIII.

Should Producer desire to use casinghead gas delivered hereunder for

gas lift purposes, Resources agrees to deliver to Producer at Resources' compressor station all or any part of Producer's share of the commingled casinghead gas stream, after compression, for the same fee as provided herein for delivery to the Gas Purchaser.

IX.

Producer shall have a preferential right to deliver to Resources for gathering and compression in Resources' system and facilities the first two thousand (2,000) MCF per day of casinghead gas delivered by all parties delivering gas to Resources for gathering and compression. During any day or days when the volume of legally produced casinghead gas tendered to Resources from wells in the field exceeds the capacity of the gathering and/or compression facilities, no vented gas shall be allocated back to any of Producer's inlet metering stations unless the total volumes of gas delivered into Resources' system by Producer are in excess of two thousand (2,000) MCF per day. Volumes delivered by Producer to Resources in ex-

cess of two thousand (2,000) MCF per day shall be treated ratably with all other gas entering Resources' system and shall bear its pro rata share of vented gas in the proportion that the volume of gas delivered to Resources on such day or days in excess of two thousand (2,000) MCF per day bears to the total volume delivered by all parties into the system on such day or days; provided, however, if at any time or from time to time it is necessary to flare gas due to the fact that certain well or wells are produced in excess of their allowables or due to the fact that a given Producer's or Producers' gas produced is in excess of its or their Gas Purchaser's requirements, then in such event the flared gas shall be allocated only to the well or wells producing in excess of the allowable or allowables or in excess of the Gas Purchaser's or Gas Purchasers' requirements. It is agreed that Producer shall only be required to pay the service charge specified in Article V with respect to gas actually delivered to the Gas Purchaser by Resources for Producer's account and/or with respect to gas actually delivered to Producer for gas lift purposes.

X.

A. Resources shall furnish Producer on or before the fifteenth (15th) day of each calendar month a statement showing the gas volume received from Producer and delivered by Resources for the account of Producer during the

preceding month and such other information as may be necessary for a fair accounting between the parties and Producer shall pay the amount determined to be due Resources within ten (10) days after receipt of such statement.

B. Producer shall have the right at all reasonable times to examine the books, records and charts of Resources to

the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to any of the provisions of this Contract; provided, however that such books, records and charts need not be preserved for a period of longer than six (6) years from the date of recording.

XI.

Insofar as Producer's lease contracts permit, Resources is granted the right to lay and maintain lines and to install any necessary equipment on Producer's leases and shall have the right to free entry for any purpose necessary or incidental hereto so long as such purpose does not interfere with lease operations or the rights of owners in fee. All line and other equipment placed by Resources on said lands shall remain the property of Resources, and subject to the terms of this Contract, may be removed by Resources at any time.

XII.

A. This Contract shall be subject to all valid and applicable laws, orders, rules and regulations of any duly constituted governmental authority.

B. In the event of any party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this Contract, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall, as far as possible, be remedied with all reasonable dispatch. The term "force

majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of governments and people, civil disturbances, explosives, breakage or accident to machinery,

plant facilities or lines of pipe, the necessity for making repairs to or alterations of machinery, plant facilities, or lines of pipe, freezing of wells or lines of pipe, inability to obtain right-of-way or plant site, partial or entire failure of wells, and any other causes, whether of a kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

XIII.

This Contract shall extend to and be binding upon the parties hereto, their successors and assigns, and shall be a covenant running with Producer's leaseholds. The rights of Resources may be assigned either in whole or in part.

XIV.

In the performance of the services herein specified, Resources is an independent contractor and agrees to hold Producer harmless against any and all claims or demands

of third parties arising because of any act or omission of Resources in connection therewith.

XV.

Any notice, request, demand, statement or bill provided for in this Contract shall be in writing and deemed given when deposited in the United States mail, postage prepaid, directed to the post office address of the parties as follows:

RESOURCES: Gas Resources Corporation
2627 Kipling, Suite 3
Houston 6, Texas

PRODUCER: Nelson Bunker Hunt, *et al.*
700 Mercantile Bank Building
Dallas 1, Texas

IN TESTIMONY WHEREOF, this instrument is executed as of the date first above written.

697

GAS RESOURCES CORPORATION

By CAREY J. O'CONNOR
President

ATTEST:

F. S. BOWEN

THOMAS J. ALEXANDER
Thomas J. Alexander
"Resources"

WITNESS:

ROBERT Z. NENIS, JR.

NELSON BUNKER HUNT
Nelson Bunker Hunt

WITNESS:

LOIS J. ORAHOOD

LAMAR HUNT TRUST ESTATE

By A. G. HILL, *Trustee*
A. G. Hill, *Trustee*

APPROVED:

CAROLINE HUNT SANDS
Member of Advisory Board

CAROLINE HUNT SANDS
Caroline Hunt Sands

WITNESS:

BARBARA ADLAN

CAROLINE HUNT TRUST ESTATE

J. A. GOODSON,
J. A. Goodson, *Trustee*
"Producer"

APPROVED:

MARGARET HUNT HILL
Member of Advisory Board

SIGNATURE PAGE TO GAS GATHERING AGREEMENT DATED FEBRUARY 15, 1961, BY AND BETWEEN GAS RESOURCES CORPORATION, AND THOMAS J. ALEXANDER, AS "RESOURCES", AND NELSON BUNKER HUNT, LAMAR HUNT TRUST ESTATE, CAROLINE HUNT SANDS AND CAROLINE HUNT TRUST ESTATE, AS "PRODUCER", CHENANGO FIELD, BRAZORIA COUNTY, TEXAS.

701

(Docketed Jun. 16, 1961)

IP No. 3457

Jun. 16, 1961

AIRMAIL

Docket No. CI61-1343
Caroline Hunt Sands

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas.

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

This is with reference to your tender on May 22, 1961, consisting of a purported compliance with, and a petition for reconsideration of, the temporary authorization granted Caroline Hunt Sands by letter order of April 25, 1961, in the captioned docket, to commence sales of natural gas in interstate commerce to Natural Gas Pipeline Company of America from the Chenango Field, Brazoria County, Texas.

After reconsideration of all known facts and circumstances involved in the aforementioned sale, your petition to eliminate the conditions attached to such temporary authorization is hereby denied.

The purported compliance specifies an initial rate of 18.0¢ per Mcf, as requested, but further provides for a 20.0¢ per Mcf rate 30 days from initial delivery. The latter provision is in conflict with the intent and purpose of the price condition attached to the temporary authorization. The intent and purpose of the condition is that the 18.0¢ per Mcf initial rate shall be effective for the duration of the temporary authorization and until a different

prospective rate is established. Conditions of temporary authorizations should be specifically complied with and without counter price adjustments which conflict with the purpose of the conditions.

The tender of May 22, 1961 is not in compliance with the condition of the temporary authorization issued by letter order of April 25, 1961, in the captioned docket, and is hereby rejected and returned herewith.

Furthermore, once service is commenced under the temporary authorization, it may not be discontinued without permission of the Commission issued pursuant to the provision of the Natural Gas Act. The time limit

which you have to transmit written acceptance of the temporary authorization, as issued, is hereby extended 20 days from the date hereof.

By direction of the Commission.

J. H. Gutrde
Secretary

Enclosure No. 85521

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

Control No. 46839

RGC
LJE:ml
6-8-61
OlOU
6/11/61
EM M
6/9/61
Chg
6/12/61

703

(Docketed July 3, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1343

In the Matter of:
CAROLINE HUNT SANDS

Acceptance Under Protest of Temporary Authority With Reservations

CAROLINE HUNT SANDS, Applicant, filed in the captioned docket an Application for a Certificate of Public Convenience and Necessity requesting authority to sell natural gas to Natural Gas Pipeline Company of America (Natural). The Application also contained a request for temporary authority to commence service immediately. By letter issued April 25, 1961, the Commission granted temporary authority to commence immediately the sale upon the following conditions:

1. That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

2. The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

3. Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

On May 22, 1961, Applicant filed its Acceptance of the Commission's Letter Order of April 25, 1961, without

prejudice to and with the express reservation of certain rights. By Letter Order issued June 16, 1961, the Commission rejected and returned Applicant's Acceptance and modified the above-designated Condition No. 1 by adding thereto the following:

> "The 18.0¢ per Mcf initial rate shall be effective for the duration of the temporary authorization and until a different prospective rate is established."

Applicant needs a suitable market for its gas; therefore, Applicant, under protest, is constrained to accept, and does hereby accept, the temporary authority issued by Letter Order dated April 25, 1961, for the sale proposed in accordance with the conditions, as modified; provided, however, that this Acceptance is made without prejudice to and with the express reservation of the following rights of Applicant:

1. To take all necessary and appropriate steps to obtain corrections of, and to seek removal of the conditions in, the Commission's Letter Orders of April 25, 1961, and June 16, 1961, including, but not limited to, the filing of an application for rehearing, and, if necessary, a petition for review; and

2. To seek an unconditional permanent certificate at 20¢ per MCF at 14.65 psia.

This Acceptance is filed under protest and without waiving any of the aforesaid rights of Applicant and without prejudice to Applicant's right to contend that its Acceptance of May 22, 1961, was in compliance with the Letter Order issued April 25, 1961, and without prejudice to

705

Applicant's right to insist upon each of the reservations set forth in Applicant's Acceptance of May 22, 1961.

EXECUTED this 29th day of June, 1961.

CAROLINE HUNT SANDS
Caroline Hunt Sands

WITNESS:
INEZ HAYGOOD

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 29th day of June, 1961.

JO HUDSON
Notary Public in and for Dallas County, Texas
[NOTARY SEAL]

My Commission expires June 1, 1963.

708

(Docketed July 3, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. CI61-1343

In the Matter of:
CAROLINE HUNT SANDS

Application for Rehearing and Reconsideration

COMES NOW CAROLINE HUNT SANDS (hereinafter referred to as Petitioner) pursuant to the provisions of Section 19(a) of the Natural Gas Act, Section 1.34 of the Commission's Rules of Practice and Procedure, and files this Application for Rehearing and Reconsideration of the Commis-

sion's Letter Order issued June 16, 1961, in the captioned docket.

In support of this Application, Petitioner would show as follows:

I.

STATUS OF PROCEEDING

On March 15, 1961, Petitioner filed an Application for a Certificate of Public Convenience and Necessity requesting authority to make a sale of gas to Natural Gas Pipeline Company of America (herein referred to as Natural) in accordance with that certain Ratification and Amendment of Gas Sales Contract dated February 15, 1961, by and between Petitioner and

Natural. An emergency existed by reason of an economic hardship and Petitioner requested authority to commence the sale proposed immediately.

In response to said Certificate Application and request for temporary authority, the Commission issued its Letter Order dated April 25, 1961, which designated the aforementioned Ratification and Amendment of Gas Sales Contract as Petitioner's FPC Gas Rate Schedule No. 9. Said Letter also granted temporary authority to commence immediately the sale proposed subject to the following conditions:

(1) That the total initial price therefor shall not exceed 18 cents per Mcf at 14.65 psia.

(2) The filing within 20 days hereof of a supplement to the rate schedule consistent with (1) above and a revised billing statement.

(3) Written acceptance of this authorization by a responsible official of the company within 20 days of the date hereof.

On May 22, 1961, Petitioner filed its acceptance of such temporary authorization reserving its rights to take the appropriate steps necessary to remove the aforementioned conditions and to seek permanent certificate authorization in accordance with the terms set forth in its original Certificate Application. In compliance with the condition of said Letter Order, Petitioner submitted an Amendment to Gas Sales Contract dated May 1, 1961, between Petitioner and Natural. This contractual amendment complied with the

Commission's condition by reducing the initial price to 18¢. It also provided for an escalation in price to 20¢ per MCF, 30 days after the commencement of deliveries.

Subsequently, Petitioner filed an Application for Rehearing wherein the Commission was requested to remove the conditions attached to the temporary authorization issued herein.

By Letter Order issued June 16, 1961, the Commission denied the aforementioned Application for Rehearing, rejected Petitioner's acceptance of the temporary authority, and amended the conditions of its Letter Order issued April 25, 1961,[1] to extend the effectiveness of the conditioned rate for the duration of the temporary authority.

---

[1] "The language of condition (1) issued in the Commission's Letter Order of April 25, 1961, is modified to read as follows:

(1) That the total initial price under this authorization shall not exceed 18¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established.

II.

Basis of Application

It is patently clear that the Commission erred in each action taken by its letter order issued June 16, 1961—(1) the denial of Petitioner's Application for Rehearing in Docket No. CI61-1343, (2) rejection of Petitioner's acceptance of temporary authority, and (3) imposition of a

condition prohibiting a rate change for duration of temporary authorization. It is Petitioner's position that the Commission, in each instance, exceeded its authority under the Natural Gas Act, acted contrary to the public interest, deprived Petitioner of valuable property rights without due process of law, acted in a most unreasonable, arbitrary, and capricious maner, and grossly abused its administrative discretion. Thus, Petitioner would request that the Commission reconsider and reverse each of these actions.

With regard to the Commission's action in denying Petitioner's Application for Rehearing, Petitioner would recall to the Commission's attention the arguments set forth in Petitioner's Application for Rehearing. Such arguments concisely and cogently establish the error of the Commission's action in issuing the April 25, 1961, order. Thus, those arguments will not be repeated again in this Application. This Application will direct itself toward the remaining errors which were perpetrated by said Letter Order of June 16, 1961:

1. Rejection of Petitioner's Acceptance of Temporary Authority.

2. Imposition of a condition prohibiting a rate change for duration of temporary authority.

712

III.

ARGUMENT

A. *Rejection of Acceptance of Temporary Authority*

There is no basis for the Commission's rejection of Petitioner's acceptance of temporary authority. The acceptance specifically complies with the conditions set forth in the Commission's Letter Order dated April 25, 1961. The initial price was reduced to 18¢ per MCF in accordance with condition No. 1 of said order. Granted, the Amendment, whereby the initial price was reduced, also provides for an additional escalation in price. However, the propriety of a subsequent price is not in issue in a Cerificate proceeding under Section 7 of the Natural Gas Act. Section 4 of the Natural Gas Act affords the Commission ample opportunity to question the just and reasonableness of any subsequent increase in price. Thus, the only price which requires any consideration by the Commission in the proceeding instituted in Docket No. CI61-1343, is the initial price. The Petitioner did exactely as the Commission requested. The initial price was reduced to 18¢ per MCF. Therefore, the Petitioner's acceptance of the temporary authority should not have been rejected. The Commission, in its Letter Order issued June 16, 1961, recognized that the Petitioner complied with the Commission's conditions; otherwise, there would have been no reason to amend the language of Condition No. 1.

713

In denying Petitioner's acceptance, the Commission states that the escalation provision of the amendatory agreement is in conflict with the "intent and purpose of the price condition attached to the temporary authority". In reply, Petitioner would urge that the only valid "intent

and purpose" for the issuance of the April 25, 1961, price condition is the protection of the gas consumer from the payment of excessive prices for natural gas pending the determination of a just and reasonable rate. If the price condition was imposed for any other reason, it was improperly imposed and therefore invalid. Petitioner submits that its acceptance is entirely consistent with the statutory intent and purpose upon which the imposition of a price condition may be predicated. It affords the consumer all of the protection of Section 4 of the Natural Gas Act and at the same time preserves to Petitioner his statutory right to receive contract prices which are shown to be just and reasonable.

One reason for the Commission's authority to attach conditions to initial price is due to the prospective effect of Section 5 proceedings. However, in situations where Section 4 of the Natural Gas Act, which is retrospective as well as prospective, may be employed, the imposition of price conditions are unnecessary because the consumer is adequately

714

protected. The Supreme Court, in its CATCO opinion[2] explicitly recognized that Section 4 of the Nathral Gas Act adequately protects the interest of the consumer:

> "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent

[2] *Atlantic Refining Company, et al. v. Public Service Commission of the State of New York, et al.*, 79 Sup. Ct. 1246, 360 U.S. 378 (1959) (The CATCO decision).

a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 350 US 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the five-month suspension provision of Section 4 and the showing of a bond, where required. This is not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases."

The Court of Appeals for the 5th Circuit gave recognition to this fact in *Texaco, Inc.* v. *Federal Power Commission*, (F. 2nd), (5th Cir., 1961). There the Court suggested that since the consumer would be adequately protected, there was nothing to prevent a producer whose rate was conditioned from filing a proposed increase in rate to the original

715

contract level. Note the following language:

"However we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here. El Paso has voluntarily agreed by contract to pay 20 cents initially for a period of five years. The fact the Commission has required its producers to deliver to it at 17.7 cents does not, it seems to us, amount to a

revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny to the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to. It does not follow that if producers are thereafter able to make a record in a Section 4(e) proceeding that would warrant the Commission's finding 20 cents to be a just and reasonable rate that the Commission would be powerless to make such a finding and approve such rate because of any contractual relations between the producers and El Paso."

Thus, the Petitioner, in accordance with the Commission's Letter Order of April 25, 1961, executed an amendatory agreement which complied explicitly with the original price condition, which was consistent with the statutory purpose of such condition and which at the same time protected Petitioner's contractual rights. Since the interest of all parties was protected by this agreement, the Commission should not have rejected Petitioner's acceptance of temporary authority which was predicated upon said amendatory agreement.

716

B. *Imposition of a Condition Prohibiting a Rate Change for Duration of Temporary Authorization*

The Commission in its Order of June 16, 1961, amended its original price conditions regarding the 18¢ initial price to provide as follows:

(1) "That the total initial price under this authorization shall not exceed 18¢ per MCF at 14.65 psia, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

Petitioner submits that such an amendment merely complicates error with error. The Commission cannot, under the terms of Section 7(e) of the Natural Gas Act, arbitrarily impose price conditions for the duration of temporary authorizations. Its attempt in the present instance is therefore a flagrant abuse of its administrative discretion in the issuance of a Cerificate of Public Convenience and Necessity.

Section 7(e) of the Natural Gas Act provides as follows:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The public convenience and necessity surely does not require any action by the Commission which denies Petitioner or any other producer of natural gas the right to establish, collect and justify, just and reasonable prices which have been agreed upon by Petitioner and its pipeline purchaser. Such

action is a deprivation of property without due process of law. It prejudges all future increases without an opportunity to be heard and is arbitrary, capricious, and contrary to the public interest.

The power to attach conditions as broad as the one here imposed would be tantamount to the power to set rates. Petitioner submits that the imposition of the proposed price condition is merely a substitution of an arbitrarily determined rate for one agreed upon by contracting parties. The Supreme Court has made clear in this regard that the Commission's function is that of reviewing rates rather

than setting rates. This is clearly illustrated in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 US 332 (1956):

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 US 338)
>
> ". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 US 343)

Also note the Supreme Court's language in *Atlantic Refining Company, et al.*, v. *Public Service Commission of the State*

718

of New York, et al., 79 Sup. Ct. 1246, 360 US 378 (1959) (The CATCO decision):

> "In granting such conditional certificates, the Commission does not determine *initial prices nor does it overturn those agreed upon by the parties. Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.*"

Thus, the Supreme Court has not construed Section 7(e) of the Natural Gas Act so broad as to grant the power and authority to attach conditions which change the pricing

structure agreed upon by the parties. The Commission cannot now presume to assume such authority under the guise of conditioning initial rates.

IV

Conclusion

In summary, it is clear that the Commission has stepped beyond the limits of its statutory authority. The seriousness of such an arbitrary and capricious departure from the Natural Gas Act is the confiscating effect it has upon Petitioner's property rights. In every particular, the Commission's action of June 16, 1961, reeks with confiscation! Summarily, without due process, the Commission has deprived Petitioner of a portion of the economic value of its gas. As may be noted in this case, from the original billing statement such value amounts to a large sum of money.

The tragedy is that the confiscation could have been avoided By accepting the Petitioner's acceptance of temporary authority, the Commission would have given the consumer the same protection which he now has without such a confiscatory disregard of Petitioner's property rights. Unless the Commission reverses its action, the Petitioner will be forever deprived of the revenues to which it is contractually entitled.

For the Commission's convenience, Petitioner submits a copy of its Acceptance of Temporary Authority as Exhibit "A" hereto. Said Acceptance is incorporated herein by reference for all purposes as if copied verbatim herein.

Wherefore, for the reasons set forth in Petitioner's original Application for Rehearing and Reconsideration filed in the captioned docket, Petitioner requests that the

Commission reconsider the issuance of its Letter Order dated April 25, 1961, and upon such reconsideration, issue temporary authorization without conditions, and rescind its Letter Order of June 16, 1961; and, in the alternative Petitioner requests for the reasons set forth hereinabove, that the Commission reconsider the issuance of its Letter Order dated June 16, 1961, and upon such reconsideration, accept the Petitioner's acceptance of temporary authorization, and delete the amendment to the price condition set forth in the Letter Order of April 25,

720

1961, and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

CAROLINE HUNT SANDS
By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

723

EXHIBIT A

AMENDMENT DATED AS OF
MAY 1, 1961
TO
GAS SALES CONTRACT
DATED AS OF MAY 15, 1959

WHEREAS, by Ratification Instrument dated February 15, 1961, CAROLINE HUNT SANDS (hereinafter referred to as "Seller") dedicated her interests in certain gas and gas rights to that certain Gas Sales Contract dated May 15, 1959, as amended, by and between Texas Illinois Natural

Gas Pipeline Company, as Buyer, and H. L. Hunt and the Estate of Lyda Bunker Hunt, Deceased, as Seller; and

WHEREAS, the Federal Power Commission by letter dated April 25, 1961, under Docket No. CI61-1343 has granted temporary authority to Seller to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America, (hereinafter referred to as "Buyer"), subject to the condition that the total initial price therefor shall not exceed 18 cents per MCF at 14.65 psia;

NOW, THEREFORE, in consideration of the premises, Buyer and Seller DO HEREBY COVENANT AND AGREE that said Gas Sales Contract dated as of May 15, 1959, as to the above-described interest of Seller only,

724

shall be temporarily amended in the following particulars, to-wit:

In Paragraph 1 of Article Ninth (Price, Billing and Payment), the words:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents;"

are temporarily deleted and in substitution therefor the following words are inserted:

> "'for gas delivered during the first four years of the delivery term (and any period prior to its commencement) the price shall be eighteen (18) cents for deliveries during the first thirty (30) days and twenty (20) cents during the remainder of said period;"

This Amendment shall be effective from the date hereof and so long as gas is delivered under the temporary au-

thorization issued by the Federal Power Commission on April 25, 1961, in Docket No. CI61-1343; provided, however, in the event the price condition attached to said temporary authorization is changed, modified or annulled, this Amendment shall terminate. At the date of termination of this Amendment the words deleted from said Gas Sales Contract by this Amendment, insofar as Seller is concerned, shall be reinstated effective as of such date as though this Amendment were never entered into.

725

Except as herein amended, all the terms and provisions of said Gas Sales Contract, as amended, shall remain in full force and effect.

EXECUTED this 1st day of May, 1961.

NATURAL GAS PIPELINE COMPANY OF AMERICA
By /s/ M. V. BURLINGAME

ATTEST:
/s/ C. G. FREUND

/s/ CAROLINE HUNT SANDS
Caroline Hunt Sands

WITNESS:
/s/ JULIE SHEERIN

726

STATE OF ILLINOIS }
COUNTY OF COOK }

BEFORE ME, the Undersigned authority, on this day personally appeared M. V. Burlingame, Executive Vice President of NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowl-

edged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 12th day of of May, 1961.

/s/ JANET PUFFER
Notary Public in and for
Cook County, Illinois

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared CAROLINE HUNT SANDS, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 9th day of May, 1961.

/s/ PEGGY J. GIBBENS
Notary Public in and for
Dallas County, Texas

My Commission expires June 1, 1961.

727

Dallas, Texas
June 1, 1961

To: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

In Account With
CAROLINE HUNT SANDS
700 Mercantile Bank Building
Dallas 1, Texas

We have charged your account as follows: Bill No. 0000

Audit No.

REVISED
BILLING STATEMENT

Gas delivered to you from the Chenango Field, Brazoria County, Texas, during the month of May, 1961:

31,000 MCF @ 18¢ $5,580.00

728

(Docketed July 26, 1961)

Docket No. CI61-1343
Caroline Hunt Sands

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Thomas G. Crouch

Gentlemen:

This is with reference to your tender on July 3, 1961 of an application for rehearing and reconsideration of the Commission's action, by letter dated June 16, 1961, in rejecting your acceptance of temporary authority submitted on May 22, 1961 in the captioned docket. The letter also clarified the intent of the temporary authorization that there should be no change in the initial rate for the duration of the temporary authorization except by further order of the Commission.

Refence is also made to your concurrently submitted acceptance under protest of temporary authority with reservations. Such submittals are relative to the sale of gas to Natural Gas Pipeline Company of America in the Chenango Field, Brazoria County, Texas. Such acceptance of the 18.0¢ initial rate complies with conditions (1) and (3) attached to such temporary authority. However, your acceptance does not comply with condition (2) of such authorization which requires the filing of a rate schedule supplement specifying the 18.0¢ per Mcf rate for the duration of the temporary authorization. Although subject to rejection, your acceptance of the temporary authority is hereby accepted provided that within 20 days of the date of this letter you submit for filing an acceptable rate

schedule supplement specifying the 18.0¢ rate for the duration of the temporary authority, as required by the temporary authorization issued in the subject docket.

729

The action herein denies your application for reconsideration which, in effect, duplicates your prior application for reconsideration in the subject docket. Your application for reconsideration is accordingly hereby rejected and returned herewith.

By direction of the Commission.

J. H. Gutride
Secretary

Enclosure No. 97819

14 copies of application mailed 7-28-61
cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
JJR:stc

730

(Docketed Aug. 3, 1961)

CAROLINE HUNT SANDS
700 Mercantile Bank Building
Dallas, Texas

August 2, 1961

Federal Power Commission
441 "G" Street, N. W.
Washington 25, D. C.

Attention: Mr. Joseph H. Gutride

Re: FPC Docket
No. CI61-1343

Gentlemen:

Your letter of July 26, 1961, advises that our acceptance of the temporary authorization complies with conditions (1) and (3) attached to such issued temporary authority, and that such acceptance does not comply with Condition (2) which requires the filing of a rate schedule supplement specifying the 18.0¢ per MCF rate for the duration of the temporary authorization. The letter further provides:

> ". . . Although subject to rejection, your acceptance of the temporary authority is hereby accepted provided that within 20 days of the date of this letter you submit for filing an acceptable rate schedule supplement specifying the 18.0¢ rate for the duration of the temporary authority, as required by the temporary authorization issued in the subject docket."

Although any compliance with said letter would be under protest and without prejudice to our rights to seek relief, we need to be advised as to whether an amendment signed by both seller and buyer is required, or whether a unilateral

agreement on our part will suffice. We respectfully request that we be advised immediately as to the construction of the word "supplement" and that we be granted an extension of time for compliance equal to 20 days from the date of your clarifying letter.

Yours very truly,

CAROLINE HUNT SANDS
By ROBERT W. HENDERSON
Robert W. Henderson

RWH:js

731

(Docketed Aug. 16, 1961)

Docket No. CI61-1343
Caroline Hunt Sands

AIRMAIL

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Robert W. Henderson

Gentlemen:

This is with reference to your letter of August 2, 1961, in reply to our letter of July 26, 1961 informing you, among other things, that your acceptance of the temporary authorization in the captioned docket is subject to rejection unless you submit a rate schedule supplement under Caroline Hunt Sands FPC Gas Rate Schedule No. 9 specifying the 18.0¢ per Mcf rate for the duration of the temporary authority.

(731)

You request advice as to whether a unilateral agreement will suffice as the "acceptable rate schedule supplement" specified in our letter of July 26, 1961. You also request an extension of time within which to comply with the terms of such letter.

A unilateral agreement specifying the 18.0¢ per Mcf rate for the duration of the period of temporary authorization in Docket No. CI61-1343 will be acceptable. You are herewith granted an extension of time for compliance with the terms of our letter of January 26, 1961 of 20 days from the date of this letter.

Very truly yours,

J. H. Gutride
Secretary

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
MH:atc
8-11-61

732

(Received Aug. 28, 1961)

FPC Gas Rate
Schedule No. 9
Supplement No. 3
Docket No. CI61-1343
IP No.
Filing Date: 8-28-61
Effective Date:
Date of Initial Delivery

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

August 25, 1961

Federal Power Commission
441 "G" Street, N. W.
Washington 25, D. C.

Attention: Mr. Joseph H. Gutride

Re: Carolina Hunt Sands
FPC Gas Rate Schedule No. 9

Gentlemen:

Consistent with the temporary authorization granted in the captioned Rate Schedule under Docket No. CI61-1343, by Letter Order dated April 25, 1961, the total initial price shall be 18¢ per MCF at 14.65 psia. In compliance with Condition No. 2 attached to said temporary authorization, please consider this letter and the attached Billing Statement as a supplement to the above-referenced Rate Schedule.

(732)

A copy of this letter and attachment is being sent to the pipeline purchaser.

Yours very truly,

CAROLINE HUNT SANDS

By Thomas G. Crouch
THOMAS G. CROUCH
Attorney

TGC:js
Attachment

733

Dallas, Texas
August 15, 1961

To: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

In Account With

CAROLINE HUNT SANDS
700 Mercantile Bank Building
Dallas 1, Texas

We have charged to your account as follows: Bill No. 000

.....

Audit No.

REVISED
SAMPLE BILLING

Gas delivered to you from the
Chenango Field, Brazoria County,
Texas—July, 1961

31,000 MCF @ 18¢ MCF $5,580.00

734

Docket No. CI61-1343
Caroline Hunt Sands

Sep. 6, 1961

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Mr. Thomas G. Crouch

Gentlemen:

This is with reference to your submittal on August 28, 1961 of a supplement to your FPC Gas Rate Schedule No. 9, specifying a rate of 18¢ per Mcf, at 14.65 psia, in compliance with the Commission's letter order of April 25, 1961, granting you temporary authorization in Docket No. CI61-1343.

This supplement has been designated as Supplement No. 3 to your FPC Gas Rate Schedule No. 9 and is accepted for filing to be effective on the date of initial delivery.

This acceptance is without prejudice to the final disposition of the application for certificate as the record may require.

Very truly yours,

Secretary

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
LJE:gbh
9-5-61

Control No. 48463

735

(Docketed Nov. 2, 1961)

Address all Communications
To the Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Caroline Hunt Sands
700 Mercantile Bank Building
Dallas 1, Texas

Attention: Robert W. Henderson, Attorney
Thomas G. Crouch, Attorney

Gentlemen:

The Commission has, on its own motion, reconsidered and by this letter supplements its letters of April 25, 1961, June 16, 1961 and July 26, 1961, in *Caroline Hunt Sands*, Docket No. CI61-1343 relating to the temporary authorization to sell natural gas for resale in interstate commerce to Natural Gas Pipeline Company of America. While it felt that the reasons for its action in conditioning the temporary authorization would be understood, it has concluded, in view of recent judicial and Commission decisions, that it should attempt a more explicit exposition of those reasons in order to dispel any doubt upon your part.

On September 28, 1960, prior to the time your certificate application was filed, the Commission issued a Statement of General Policy No. 61-1 which set forth rate standards based on its experience gained in six years of regulation of independent producers. By this Statement of Policy it found that the highest price for the area wherein you are selling gas should be established at 18¢ per Mcf at 14.65 psia. It felt that you have not established in connection with the issuance of temporary authorization any sufficient

reason which would justify the collection of a higher price. Your contract calls for a price of 20¢ per Mcf with periodic escalations of 2¢ per Mcf at the end of each subsequent four-year period for the twenty-year term of the contract. It should be noted that when all aspects of the price are considered, the price you are seeking to receive for your gas would be the highest price received by any producer under certificate authorization in this area. You have cited in support of your 20¢ per Mcf price the Commission's prior decision in *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, 24 F.P.C. 1, as amended 24 F.P.C. 106, and *Trunkline Gas Company, et al.*, 21 F.P.C. 704. In so doing you ignore the very important fact that the 20¢ per Mcf price in both of those cases was allowed only because it was a *firm* price for ten years. That is, there would be no escalation in price permitted under the contract for a ten-year period. This the Commission found in *Trunkline* to be most important, stating at 21 F.P.C. 719:

738

> Secondly, and most important, these contracts provide for a firm 20-cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20-cent price is required by the public convenience and necessity; and, *it will not be sufficient for producers hereafter seeking certification to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price.* (Emphasis added.)

The Commission reiterated the importance of this factor in its *Peoples Gulf Coast* decision where it imposed a con-

dition upon the producer authorizations requiring that the contracts be amended to eliminate the four-year escalation provisions, substituting therefor the ten-year period provided for in the *Trunkline* contracts. That condition imposed by the order in Docket No. G-19086, *et al.*, was accepted by the applicants in that proceeding. No new reason to allow an unconditioned certificate in this proceeding was advanced in any of the filings before the Commission at the time the temporary authorization was issued.

Furthermore, the 20-cent price which was allowed in the *Peoples Gulf Coast* proceedings for the firm period of ten years is, as a result of recent court action, open to question and a "suspect" price. For in *Public Service Commission of New York* v. *F.P.C.*, CADC Nos. 15366, *et al.*, decided June 15, 1961, the Court set aside the Commission denial of intervention in those proceedings by PSC of New York. Thus, the prices there involved are still open to question. Reliance upon such a basis to establish a new and higher price line would be wholly unwarranted.[1]

Moreover, information in the Commission's records also indicates that the charging under your contract of the 20¢ rate subject to a contingent obligation to refund may have an inflationary effect upon the prices charged and to be charged by others in the area, particularly where the 20¢ rate is only the first step of a periodically rising price. Each charging may "trigger" or serve as a basis for price redeterminations at higher levels under escalation provisions in the other contracts in the area and may well trigger higher prices by producers, both those

---

[1] See, *e.g.*, *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133, 137, 138 (CA 5); certiorari denied *sub nom.* *Sun Oil Co.* v. *United Gas Improvement Co.*, Oct. Term, 1961, No. 149, decided October 9, 1961.

under contract and those who will, in the future, contract to sell natural gas.[2]

It is a fundamental prerequisite to the obtaining of a certificate that an independent producer show that his proposed initial price is in the public interest. The Commission's policy and the Natural Gas Act require each application to meet minimal standards as to the price factor. The Commission has sought to announce standards which have some element of precision in our General Policy Statement. No justification has been established by you in this proceeding, either in your application for temporary authorization or in allied filings, for the establishing of a higher price than that set forth in the General Policy Statement.

Nevertheless, upon reconsideration of the Commission's action in rejecting the rate schedule supplement which you tendered for filing in this proceeding in attempted compliance with the conditions in the temporary authorization that service be commenced at an initial price of 18 cents, the Commission has determined that the filing of the supplement will be allowed, if retendered. While filing will be allowed for the express purpose of permitting there to be on file the contractual agreement between you and Natural Gas Pipeline Company of America under which you will be receiving 18¢ per Mcf, this should not be construed as permission for you to file for an increased rate pursuant

[2] Among existing contracts which may be triggered or for which the proposed rate may serve as a basis for a price redetermination at a higher rate are: Gulf Oil Corporation, FPC Gas Rate Schedule No. 41, Sun Oil Company (Operator), *et al.*, FPC Gas Rate Schedule No. 41, Texaco Inc., FPC Gas Rate Schedule No. 141, Pan American Petroleum Corporation, FPC Gas Rate Schedule No. 98, Hudgins Oil and Gas Company, FPC Gas Rate Schedule No. 1 and Amerada Petroleum Corporation, FPC Gas Rate Schedule No. 8.

to Section 4 (d) of the Natural Gas Act during the pendency of the temporary authorization. The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4 (d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective

even though those rates might irrevocably breach the price line or trigger price increases. It has not been shown that the public interest will permit temporary authorization of the proposed sale without the condition heretofore prescribed by the Commission to prevent such consequences.

By direction of the Commission.

Secretary

1400

(Docketed July 1, 1960)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck and Arthur Kline.

Docket No. G-19086

PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY AND NATURAL GAS PIPELINE COMPANY OF AMERICA

Docket No. G-19115
HASSIE HUNT TRUST, OPERATOR, ET AL.

Docket No. G-19116
H. L. HUNT, OPERATOR, ET AL.

Docket No. G-19117
HUNT OIL COMPANY

Docket No. G-19118
WILLIAM HERBERT HUNT TRUST ESTATE, OPERATOR

Docket No. G-19119
LAMAR HUNT TRUST ESTATE

Docket No. G-19123
GEORGE W. GRAHAM, INC., OPERATOR, ET AL.

Docket Nos. G-19124, G-19125
PLACID OIL COMPANY, OPERATOR, ET AL.

Docket No. G-20202
NATURAL GAS PIPELINE COMPANY OF AMERICA

Docket No. G-20313
IOWA SOUTHERN UTILITIES COMPANY

Docket No. G-20335
MISSOURI UTILITIES COMPANY

Docket No. G-20591
CITY OF CORNING, IOWA

Docket No. G-20593
IOWA-ILLINOIS GAS AND ELECTRIC COMPANY

Docket No. CP60-42
LATERAL GAS PIPELINE COMPANY

Docket No. CP60-43
IOWA ELECTRIC LIGHT AND POWER COMPANY

Docket No. CP60-48
IOWA POWER AND LIGHT COMPANY

(1400)

Order Issuing Certificates of Public Convenience and Necessity

(Issued July 1, 1960)

These consolidated proceedings concern an application by Peoples Gulf Coast Natural Gas Pipeline Company and Natural Gas Pipeline Company of America seeking authorization to construct and operate additional pipeline facilities for the purpose of increasing the daily design capacity of Peoples Gulf Coast by 85,000 Mcf per day (G-19086). In this application, Peoples Gulf Coast seeks authorization to abandon the sale of gas to its existing customers in order to sell to Natural all of its gas which would be delivered by means of existing and proposed facilities. Natural seeks a certificate authorizing the sale of gas to existing and proposed customers, both Peoples Gulf Coast's and Natural's.

In Docket No. G-20202, Natural seeks authorization to construct and operate approximately 151 miles of 36-inch main line loop pipeline between Compressor Station No. 103 and the Joliet, Illinois, metering station with additional metering and regulating facilities at Joliet. Natural also seeks authority to construct and operate approximately 180 miles of 24-inch pipeline between Compressor Station No. 156 and Compressor Station No. 103. By these projects Natural proposes to increase the sales capacity of its system by 100,000 Mcf per day.

1401

Six applicants have filed under Section 7(a) of the Act, with the Commission, seeking gas service from Peoples Gulf Coast and Natural. Hassie Hunt Trust, *et al.*, H. L. Hunt, *et al.*, Hunt Oil Company, W. H. Hunt Trust Estate, Lamar Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Co., seek certificates of Public convenience and necessity for authorization to sell natural gas to Peoples Gulf Coast produced in Aransas, Brazoria, Calhoun and Galveston Counties, Texas.

All of these applications were consolidated for hearings, a number of parties were permitted to intervene and hearings were held from April 11 to April 29, 1960 and from May 17 to May 20, 1960. At the conclusion of the hearings, a motion was introduced to waive the intermediate decision procedure. This motion was unopposed by any of the parties and was granted by our order of June 1, 1960. On June 16, 1960, we heard oral argument.

The issues which are presented in these proceedings are (1) whether Natural and Peoples Gulf Coast have made an adequate showing in support of any and all of the proposed expansion of facilities; (2) whether the public interest would be best served by allowing Natural to make all of the sales of gas at this time; (3) whether the Section 7(a) applicants have shown a public need for the gas which they seek and economic feasibility of their projects; (4) whether the independent producers have demonstrated that the public convenience and necessity require the sale of natural gas by them and, if so, at what initial price such sales have been justified. Based upon the evidence of record, the oral argument and the briefs filed herein, we are granting the applications as set forth below, upon such conditions as we believe to be necessary in the public interest.

Peoples Gulf Coast and Natural are affiliates which both serve the major Chicago area market. In so doing, they make deliveries to three principal Chicago area customers: Northern Illinois Gas Company, Northern Indiana Public Service Company and The Peoples Gas Light and Coke Company (PGL). In addition these pipeline companies make deliveries to so-called downline customers which include all other distribution customers except the Chicago area customers. Natural also makes some direct sales to industrials, but Peoples Gulf Coast makes no such sales.

(1401)

PGL is the parent company of a system which incorporates Natural, Peoples Gulf Coast, Chicago District Pipeline Company, Texoma Production Company, Peoples Production Company and Natural Gas Storage Company of Illinois. Texoma and Peoples Production Company are involved only in the exploration and development of gas reserves. Insofar as actual deliveries of gas to the consumer are concerned, the companies which are here involved are: Peoples Gulf Coast and Natural, Natural Gas Storage Company of Illinois, Chicago District Pipeline Company and PGL. PGL's common stock is publicly owned. Peoples Gulf Coast and Natural are wholly owned subsidiaries of PGL. Natural Gas Storage Company of Illinois is a wholly owned subsidiary of Natural and Peoples Gulf Coast, each of which owns half of the common stock of the storage company. Chicago District Pipeline Company is wholly owned by PGL. The 3 companies delivering the supply of gas to the distributor, Natural, Peoples Gulf Coast, and Natural Gas Storage, are operated on an integrated basis.

1402

The facilities proposed by Peoples Gulf Coast would increase its daily design capacity by 85,000 Mcf per day and those by Natural would increase its daily design capacity by 100,000 Mcf per day. The proposed increase of 85,000 Mcf per day in the daily design capacity of the Peoples Gulf Coast system is to be made available first for meeting requirements of the downline customers of the joint applicants, namely those customers of Peoples Gulf Coast and Natural other than Northern Illinois, Northern Indiana and PGL. Northern Indiana does not desire to participate in the allocation of any part of the increased capacity remaining after providing for the requirements of the downline customers. The quantity remaining after providing for the requirements of the downline customers

and the 7(a) applicants has been equally divided between PGL and Northern Illinois. The proposed increase of 100,000 Mcf per day in the daily design capacity of Natural will be divided among the 3 Chicago area customers in the amounts of 42,000 Mcf to PGL, 52500 Mcf to Northern Illinois, and 10,500 Mcf to Northern Indiana.[1]

To accomplish the proposed 85,000 Mcf increase in the Peoples Gulf Coast daily design sales capacity, Peoples Gulf Coast requests the issuance of a certificate authorizing the construction and operation of the following facilities:

1. A total of approximately 371.4 miles of 30-inch partial loop pipeline extending from the discharge side of Peoples Gulf Coast's Compressor Station Nos. 303, 305, 307, 309 and 311;

2. 5.5 miles of 6-inch lateral pipeline extending from the treminus of Peoples Gulf Coast's Chocolate Bayou lateral pipeline to the Alvin City Field in Brazoria County, Texas;

3. 9.5 miles of 10-inch lateral pipeline extending from the terminus of Peoples Gulf Coast's Chocolate Bayou lateral to the Alta Loma Field in Galveston County, Texas;

4. 21.4 miles of 8-inch lateral pipeline extending from Peoples Gulf Coast's existing 26-inch main transmission pipeline to the Fulton Beach Field in Aransas County, Texas;

5. 19.3 miles of 6-inch lateral pipeline extending from a point on the proposed Fulton Beach lateral to the Zoller Field in Calhoun County, Texas.

6. 4 gas purchase meters;

---

[1] Totalling 105,000 on an "as billed" basis and 100,00 Mcf as metered at 14.65 psia and 60° F.

7. A new compressor station with two (2) 3000 BHP units installed, to be located at a point on Peoples Gulf Coast's existing La Gloria lateral pipeline in Victoria County, Texas.

1403

The total estimated cost of these facilities is $43,451,000 including estimated allowances for contingencies, engineering, general and administrative expenses and interest during construction. This estimate appears to be reasonable.

To accomplish the proposed 100,000 Mcf increase in Natural's daily design sales capacity, Natural requests the issuance of certificates of public convenience and necessity authorizing the construction and operation of the following facilities:

1. 151.21 miles of 36-inch partial loop pipeline paralleling existing transmission pipelines at various locations between Compressor Station No. 103 and Joliet, Illinois meter station;
2. approximately 180 miles of 24-inch pipeline between Compressor Station No. 156, located in Kiowa County, Oklahoma, and Compressor Station No. 103;
3. additional metering and regulating facilities at the Joliet, Illinois meter station.

The total estimated cost of these proposed facilities, including engineering and general and administrative expense, interest during construction and allowance for contingencies, is $31,188,000, which also appears to be reasonable.

The evidence in the record showing the estimates of annual and peak day requirements of the proposed cus-

tomers and the long waiting list for gas service in the Chicago area leave no doubt as to the existence of markets for the proposed sales. Similarly there is ample evidence of the ability of these pipelines to obtain favorable financing for these projects regardless of whether the companies are merged or are financed separately.[2]

The record discloses that the natural gas reserves available to Natural will have a deliverability life of approximately 14 years at the 268,300,000 Mcf annual rate of withdrawal that is forecast (Exhibit No. 42). Similarly, the record shows that Peoples Gulf Coast's reserves, including the new supplies proposed to be attached, will have a deliverability life of 11 years at the forecasted 194,300,000 Mcf annual rate (Exhibit No. 41). This latter supply is less than the 12 year minimum we have previously indicated to be required for issuance of a certificate to an established pipeline with proven ability to connect new reserves. See *Trunkline Gas Company*, 21 FPC 704; *Tennessee Gas Transmission Company*, 21 FPC 653; *Texas-Illinois Natural Gas Pipeline Company*, 22 FPC 979.

1404

Since the two companies are under common corporate control and management, a study showing the maximum combined deliverability life should have been presented. Such a study would have aided in disposition of these matters. However, the record discloses that under the operating conditions assumed, Natural will operate its system at approximately an 85 percent load factor. Thus, under combined operations, increased takes from Natural's

[2] As we note below, Natural has filed an application in Docket No. CP60-97, seeking authorization to acquire all of Peoples Gulf Coast's property. If this merger were to take place as well as the expansion proposed herein, Natural's capitalization would be 60.8 percent debt, 7.7 percent preferred stock and 31.5 percent common stock and surplus.

supply sources and slightly less takes from Peoples Gulf Coast sources are possible. This would decrease Natural's deliverability life while increasing that of Peoples Gulf Coast, achieving a combined life in excess of 12 years. It is logical to conclude that the common management will strive to achieve the greatest possible combined deliverability life. We therefore, find that the applicants have met our previously set minimal supply standard and have a gas supply reasonably adequate to support the proposed construction.

The only issues raised by any of the parties regarding authorization of these pipeline proposals are in regard to whether the facilities proposed are all necessary to render the proposed new services and whether the proposal to make all of Peoples Gulf Coast's sales through Natural is in the public interest at this time.

Our staff agrees that Natural's facilities proposed in Docket No. G-20202, are fully required by the public convenience and necessity but based on annual loads, staff argues that the facilities proposed by Peoples Gulf Coast may not be necessary to deliver the increased capacity proposed. Staff's position is based on the fact that much of the increased capacity sought will be necessary only for peak day requirements and that by proper use of other peaking facilities and elimination of some sales the PGL system could get along without this additional capacity. However, it appears that the new customers to be added as a result of the expanded facilities are almost all small commercial and residential space heating consumers. These customers will not use gas during the entire year but rather will use it primarily during the winter heating season. Thus the annual requirements of the system will have a daily average far below the requirements during the winter heating season and are not a valid measure of the necessary capacity. The local storage and peak shaving facilities

of PGL are not made wholly clear in the record, but there is enough to show that they are no so reliable as to allow responsible management to attach a large number of new customers who would be wholly dependent on such a questionable supply. We do not feel that because the proposed facilities will be used at a very low load factor during the summer months, that we should deny many Chicago residents the benefits of gas heating during the winter months.

Oklahoma Natural Gas Company and the City of Chicago have questioned the necessity of constructing the 180 mile, 24-inch crossover line between Compressor Station No. 156 in Kiowa County, Oklahoma and Compressor Station No. 103 in Docket No. G-20202. Chicago, quite naturally, wishes to be assured of benefits commensurate with the costs of this line. Oklahoma Natural argues that other competing gas purchasers in a producing area serve only to bid the price of gas ever upward. Both Chicago and Oklahoma Natural have attempted to show that Natural could obtain the increased capacity sought by the construction of additional compressor facilities at a cost of 3 to 5 million dollars less than the cost of the proposed 24-inch line. They argue that no new gas purchases have as yet been made for this line.

These arguments fail to give proper weight to two important considerations. The first is that Natural has considerable supplies already available from several sources but cannot take from all of these sources at one time because of the bottleneck caused by the present line. By crossing directly to one of its main gas sources from its main line, Natural can obtain much greater flexibility in tapping its present supply sources. Secondly, as Oklahoma Natural apparently fears, but Chicago should appreciate, this new line will enable Natural to start purchasing gas from one of the more prolific producing areas in the country. As

our staff pointed out, the future public convenience and necessity should not be ignored. The expenditure of $8,000,000 solely to increase capacity on Natural's existing pipeline with no prospective benefits either in flexibility or new supply sources is not as much in the public interest as the expenditure of $11,000,000 to obtain the same increased capacity plus future prospects of added supply sources, greatly increased flexibility and the possibility of future expansion of capacity at a much lesser cost. In addition, the record shows that the alternatives proposed by Oklahoma Natural would have operational costs ultimately making them as expensive as the pipeline, without the added benefits.

Our staff has also objected to the authorization sought for Natural to become the sole seller of all the gas to be delivered by it and Peoples Gulf Coast, the latter selling to Natural all gas to be delivered by it through its existing and proposed facilities. There is no physical interconnection between the two companies and, while gas is delivered by both pipelines to common customers in the Chicago area, there are deliveries made by each pipeline to its own separate downline customers.

There is to be no consolidation of supply at this time, since each company would maintain its own supply system, nor will there be a merger of company operations as a result of the requested shifting of sales. Each company would continue to make physical deliveries to customers along its pipeline and the Chicago area customers would continue to receive gas from both. However, as a result of this request, there would be a rolling in of the cost of all of the Peoples Gulf Coast gas to Natural. We cannot ignore the effect upon the rate structure of Natural as a result thereof. The presently effective rates of the two companies are different. Natural, in a pending rate case,

has requested the elimination of its two-block rate system. Natural also has filed an application whereby it seeks to acquire the facilities of Peoples Gulf Coast in order to consummate a merger with that company. It may be more appropriate to consider this matter in those cases.

We cannot, at this time, find that the public would be benefited by the Applicants' proposal to make Natural the sole seller. As a result of this plan there would ultimately follow a shifting of responsibility for the cost of the gas, as was shown on the record. It does not appear from this record that there are any benefits accruing to the public which would balance this shifting of costs. We are, therefore, constrained to deny Applicants' request for approval of this aspect of their application at this time.

Of the 6 applicants for gas service under Section 7(a) in these proceedings, no question exists as to the pipeline's ability to supply the services requested. The need and feasibility of the service required by Iowa Southern Utilities Company, Docket No. G-20213, City of Corning, Iowa, Docket No. G-20591, Iowa-Illinois Gas and Electric Company, Docket No. G-20593 and Iowa Electric Power Company, CP60-43 are also unquestioned.

The application by Missouri Utilities Company, Docket No. G-20335, for peak day services of 1375 Mcf per day has been questioned by our staff to the extent that the proposed rates upon which the feasibility of the project rests have not yet been approved by the Missouri Commission. In addition, staff has questioned the inclusion of 100 Mcf per day for interruptible sales to an alfalfa dehydration plant and a shoe factory which presently burns its own waste materials. It appears that the alfalfa plant will operate only between April and October and will never require service on peak days. As an interruptible cus-

tomer, the shoe factory cannot expect service on peak days. Therefore, consistent with staff's recommendation, we will grant the application in Docket No. G-20335, conditioned upon the approval of the rates by the Missouri Commission and less the 100 Mcf per day unnecessary for peak day sales.

The application of Iowa Power and Light Company for service to the towns of Milo, Elliot, Dallas and Melcher, Iowa, is questioned by staff on the ground that, while supply and need are shown, economic feasibility of the project has not been shown. It appears that the rate of return shown by Iowa Power and Light did not take into account the rate changes which will result from Natural's expanded services. However, Iowa Power and Light correctly points out that it is a large non-jurisdictional public utility company with a duty to provide needed services, regardless of the fact that some services may yield a lesser return than others. Natural, the jurisdictional company, will need to construct no facilities and would receive the going rate for its gas. Service to these towns will be such a minor part of Iowa Power and Light's operations that a low return for the services will have no noticeable effect on the over-all operations of the company. We should therefore grant Iowa Power and Light's request for gas for these towns.

Turning now to the producer sales, the record shows, and no party contests, the fact that the proposed sales are vitally needed by Peoples Gulf Coast for its interstate markets. Peoples Gulf Coast has a minimum of reserves and the large package of gas which it seeks in these proceedings is necessary if its customers are to be protected adequately from future shortages and assured of continuous service. The only doubtful aspect of these sales is whether the proposed prices will have an adverse effect on the public interest and will thereby necessitate the attachment of a

price condition to bring them within the requirements of the public convenience and necessity as contemplated by the Supreme Court decision in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York,* 360 U. S. 378.

Essentially, the price justification presented by the producers in these proceedings, takes that form generally presented in the past by producers when seeking certificates. The record shows that the contracts were signed after arm's length bargaining; that there is no corporate relationship between purchaser and seller; that the price sought is no higher than the price obtained by other producers in the area from interstate or intrastate sales which have been or will be made; that equally high or higher prices

have been offered for the gas or would be offered for the gas; that there is a possibility that the gas would be sold into the intrastate market if the requested certificate at the requested price is not issued; and that there is a great need for the gas in buyer's market area.

In addition, some generalized cost evidence was introduced. Such evidence showed certain investments for one field, drilling costs in that field and the relatively greater difficulty and expenses encountered in obtaining some of this gas as compared to drilling in the open plains. Such cost evidence was not complete and no attempt was made to relate this evidence to the actual price to be charged for the gas and such cost evidence was apparently intended only to show why this gas might be worth more than some other gas.

The primary justification relied on by the producer applicants for the initial 20-cent per Mcf price proposed herein is our decision in *Trunkline Gas Company,* 21 F.P.C. 704,

wherein we certificated sales from this same area and in some instances from the same wells, at an initial price of 20 cents per Mcf. In so doing, we stated as follows:

> These contracts are unique in several respects. In the first place they involve some of the largest volumes of gas yet committed to the interstate market from the Texas Gulf Coast area. Secondly, and most important, these contracts provide for a firm 20-cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20-cent price is required by the public convenience and necessity; and, it will not be sufficient for producers hereafter seeking certification to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price. We shall closely scrutinize any such proposed sales in this area under contracts which provide for price escalations or redeterminations above 20 cents per Mcf within a period of five years, and in the absence of a clear showing that such prices are required by the public convenience and necessity, we shall either deny the application or impose price conditions. 21 F.P.C. 704, 719.

Like the contracts in the Trunkline proceedings, the contracts involved in these proceedings called for an initial price of 20 cents per Mcf. Unlike the Trunkline contracts, the contracts here involved call for 2 cent price escalations every 4 years until a price of 28 cents per Mcf is reached. This results in an average price well above that in the Trunkline sales and is contrary to the aspect of the Trunk-

line sales which we clearly stated to be the most important, i. e., the firm price for ten years.

1408

At the oral argument the only justification for this difference advanced by the producer applicants was that they will gather, dehydrate and compress the gas prior to its delivery to Peoples Gulf Coast, whereas this service was to be performed by the purchasers in the Trunkline contracts. The record indicates, however, that the producers here insist upon the right to process the gas and retain all of the liquid hydrocarbons recovered by such processing. The contracts refer to this processing and retention of the products obtained as a right. The testimony indicates that these producers could not say precisely how much this right is worth to them, but since they always insist upon the right it is only reasonable to conclude that they expect that the value of the products recovered will normally exceed the processing costs.

This leaves the applicants with no showing of any justification for failing to take proper account of the firm price factor which we held to be necessary in Trunkline. In keeping with the Supreme Court's decision in *Atlantic Refining Co.* v. *Public Service Comm., supra,* looking to holding the price line and our own position in Trunkline, we will therefore impose a condition upon the producer authorizations requiring that the contracts be amended to eliminate the four year escalation provisions and substitute therefor escalation provisions which will result in a price structure like that provided for in the Trunkline contracts.

The Commission finds:

(1) Peoples Gulf Coast, Natural, Iowa-Illinois Gas and Electric Company, and lateral Gas Pipeline Company are natural gas companies as heretofore found by the Commis-

sion; and each producer applicant is, or will be, upon the commencement of the service authorized herein, a natural gas company within the meaning of the Natural Gas Act.

(2) The facilities described above and more fully described in the applications in Peoples Gulf Coast in Docket No. G-19086 and Natural in Docket No. G-20202 will be used for the transportation and sale of natural gas in interstate commerce for resale as integral parts of the pipeline systems of their respective owners, and their construction and operation are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) The facilities described in the applications of Iowa-Illinois in Docket No. G-20593 and Lateral in Docket No. CP60-42 will be used for the transportation of natural gas in interstate commerce, and their construction and operation are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sales of natural gas by the producer applicants described above and as more fully described in the applications will be made in interstate commerce subject to the jurisdiction of the Commission, and such sales by the producer applicants together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) Peoples Gulf Coast, Natural, Iowa-Illinois, Lateral and the producer applicants are able and willing to do the acts and perform the services proposed and to conform to the provisions of the Natural Gas Act and the rules and regulations thereunder.

(6) The proposed construction and operation of facilities and transportation proposed by Peoples Gulf Coast,

Natural, Iowa-Illinois and Lateral and the sales by Peoples Gulf Coast, Natural, and the producer applicants are required by the public convenience and necessity and certificates therefor should be issued as hereinafter ordered and conditioned.

(7) The request for authorization whereby Natural will become the sole seller of all the gas to be delivered by it and by Peoples Gulf Coast is not required by the public convenience and necessity.

The Commission orders:

(A) Certificates of public convenience and necessity are hereby issued to Peoples Gulf Coast and Natural to construct and operate the facilities described above and more fully described in the applications in Docket Nos. G-19086 and G-20202 and to Peoples Gulf Coast to transport and sell up to 85,000 Mcf per day and for Natural to transport and sell up to 100,000 Mcf per day of natural gas subject to the jurisdiction of the Commission upon the terms and conditions of this order.

(B) Certificates of public convenience and necessity are hereby issued to Iowa-Illinois Gas and Electric Company in Docket No. G-20593, and Lateral Gas Pipeline Company in Docket No. CP60-42 to construct and operate the facilities more fully described in the applications subject to the jurisdiction of the Commission upon the terms and conditions of this order.

(C) Certificates of public convenience and necessity are hereby issued upon the terms and conditions of this order, authorizing the sales by the producer applicants of natural gas in interstate commerce for resale, together with the construction and operation of any facilities subject to the jurisdiction of the Commission used for the sale of natural

gas in interstate commerce as hereinbefore described and as more fully described in the applications and exhibits in these consolidated proceedings. The certificates issued by this paragraph are not transferable, shall be effective only so long as applicants continue the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission, and shall be accepted in writing and under oath within thirty days after the date of issuance of this order.

(D) The general terms and conditions set forth in paragraphs (a), (b), (c), and (e) of Section 157.20 of the Commission's regulations under the Natural Gas Act, shall attach to the issuance of the certificates granted in paragraphs (A) and (B) hereof and to the exercises of the rights granted thereunder.

(E) The time within which the facilities hereby authorized in paragraphs (A) and (B) shall be constructed and placed in actual operation as provided in paragraph (b) of Section 157.20 of the Commission's regulations is hereby fixed at 12 months from the date on which this order issues.

(F) The certificate issued by paragraph (A) to Peoples Gulf Coast is conditioned upon all of the producers, who have made application herein, accepting the certificates issued to them within thirty days after the date of issuance of this order as provided in paragraph (C) herein.

(G) The certificates issued to Natural and Peoples Gulf Coast are further conditioned to require that the services requested by the 6 applicants under Section 7(a) of the Act in Docket Nos. G-20313, G-20335, G-20591, G-20593, CP60-43 and CP60-48 shall be performed as to their esti-

mated third year peak requirements as set forth in those applications provided that the peak day service to Missouri Utilities Company in Docket No. G-20335 shall be reduced from 1375 Mcf per day to 1275 Mcf per day and such service in Docket No. G-20335 shall not be commenced until Missouri Utilities Company has secured the approval of its rates by the Public Service Commission of Missouri, and provided that service to any one of the 7(a) applicants shall be required only if such applicant is prepared to receive gas from Peoples Gulf Coast and Natural within 12 months from the date this order is issued.

(H) The request for authorization whereby Natural would become the sole seller of all gas to be delivered by it and by Peoples Gulf Coast is hereby denied and the sales by Peoples Gulf Coast and Natural shall be continued under the rate structures presently on file with the Commission.

(I) The cerificates issued to the producer applicants in ordering paragraph (C) are expressly conditioned upon the filing of revised contracts which will be identical to the present contracts except to change the price provisions so that they will provide for an inital price of 20 cents per Mcf with an escalation of 3 cents per Mcf after ten years.

(K) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Rules and Regulations thereunder, requiring

the filing of rate schedules for the services herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the respective Applicants. Further,

our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provisions in the gas purchase contracts herein involved. Escalation provisions in the contracts, when invoked to change the effective rates and charges, will constitute a change in such rates and charges within the meaning of Section 4(d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under the Act.

By the Commission. Commissioner Kline dissenting to that part of the order which issues a certificates covering approximately 180 miles of Natural's 24-inch pipeline between Compressor Station No. 156 and Compressor Station No. 103 on the ground that Natural has failed to show that public convenience and necessity requires the construction of such line.

(SEAL)

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

1412

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket No. G-19086

PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY AND NATURAL GAS PIPELINE COMPANY OF AMERICA

Docket No. G-19115
HASSIE HUNT TRUST, OPERATOR, ET AL.

Docket No. G-19116
H. L. HUNT, OPERATOR, ET AL.

Docket No. G-19117
HUNT OIL COMPANY

Docket No. G-19118
WILLIAM HERBERT HUNT TRUST ESTATE, OPERATOR

Docket No. G-19119
LAMAR HUNT TRUST ESTATE

Docket No. G-19123
JEORGE W. GRAHAM, INC., OPERATOR, ET AL.

Docket Nos. G-19124, G-19125
PLACID OIL COMPANY, OPERATOR, ET AL.

Docket No. G-20202
NATURAL GAS PIPELINE COMPANY OF AMERICA

Docket No. G-20313
IOWA SOUTHERN UTILITIES COMPANY

Docket No. G-20335
MISSOURI UTILITIES COMPANY

Docket No. G-20591
CITY OF CORNING, IOWA

Docket No. G-20593
IOWA-ILLINOIS GAS AND ELECTRIC COMPANY

Docket No. CP60-42
LATERAL GAS PIPELINE COMPANY

Docket No. CP60-43
IOWA ELECTRIC LIGHT AND POWER COMPANY

Docket No. CP60-48
IOWA POWER AND LIGHT COMPANY

Order Amending Order Issuing Certificates of Public Convenience and Necessity and Denying Petition for Rehearing

(Issued July 29, 1960)

On July 11, 1960, the producer applicants in the above dockets filed a petition for rehearing of the Commission's order issued July 1, 1960, in the above entitled proceedings. By that order we issued certificates for certain pipeline facilities and services and for the sale of natural gas by independent producers to Peoples Gulf Coast Natural Gas Pipeline Company. The producers' certificates were conditioned upon the elimination of 4-year escalation clauses and the substitution therefor of the same 10-year escalation provision which we found to be in the public interest in *Trunkline Gas Company*, 21 F.P.C. 704. Essentially the petitioners argue that we have no power to require the changes in the proposed contracts and that they are entitled to the higher average price because their costs will be higher than those of the producers selling to *Trunkline*.

In a certificate application the question presented is whether the particular service as proposed is required by the public convenience and necessity. If we find that while the service may be generally required, certain aspects of the proposal are contrary to the public interest, we can either deny the certificate or condition it upon correction of the

objectionable features. Where we impose such conditions the applicant may reject the certificate if he feels that the conditions are unduly burdensome. Petitioners, who had the burden of proof, did not convince us that the sales as proposed in their contracts were required by the public convenience and necessity. Rather than deny the certificates, however, we granted them on the condition that the

objectionable feature of the proposal, the 4-year escalations, be eliminated.

What the condition imposed in these proceedings is intended to do, is to prevent gas prices from spiralling upward while proper prices are being determined. The *Trunkline* prices were somewhat above previously certificated prices for the producing area here involved and as stated in our decision, it was primarily the firm price feature which convinced us that the public convenience and necessity required the sales.

In keeping with our determination that the public interest requires that we hold the price line for producer sales, we have carefully reviewed the contracts here involved. Such review has brought to our attention that the *Trunkline* sales here relevant were all made in Texas Railroad Commission District No. 3. Certain of the sales in these proceedings are to be from Aransas county in Railroad District No. 4. In Railroad District No. 4 the highest price previously found by us to be required by the public convenience and necessity is 18 cents per Mcf (See *Texas-Illinois Natural Gas Company,* 22 F.P.C. 979). These sales were under terms comparable to the terms of the contracts involved here. In relying on the *Trunkline* sales the petitioners show no justification at all for our allowing prices in Railroad District No. 4 to rise higher. We are therefore constrained to amend our order of July 1, 1960, to provide that the certification of the producer sales from Aransas county be conditioned upon the amendment of the sales contracts to provide for an initial price of 18 cents per Mcf. Modification of the escalation provisions for the sales from Aransas county will no longer be necessary.

Our further review of the producer sales here involved also affirms our belief that the sales from Galveston and

Brazoria counties should be conditioned to provide for the relatively firm prices called for in the *Trunkline* contracts.

As we indicated in our order of July 1, 1960, we are not convinced by the petitioners' generalized cost estimates that even higher prices in these producing areas will serve the public interest. The *Trunkline* certificates were not based primarily on cost evidence and petitioners' argument that gathering and processing will give them higher costs than the producers selling to *Trunkline* does not establish that higher prices here are in the public interest. Nor does the fact that the *Trunkline* producers may recover the liquids after the purchaser has gathered the gas, whereas here the producers must do their own gathering, convince us that the public should be required to accept the gas sales here under less favorable terms than in *Trunkline*.

Petitioners further cite the specific cost evidence introduced at the hearing as support for the higher average price sought. Even if we were to accept as correct, which we do not, these specific cost estimates made by petitioners, 35 cents to 35.6 cents per Mcf, we could not hold that such expensive gas was at this time required by the public convenience and necessity.

The Commission further finds:

(1) Our order of July 1, 1960, in these proceedings should be amended to provide that the certificates issued to Hunt Oil Co., William Herbert Hunt Trust Estate, Lamar Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Company for sales from Aransas county in Railroad District No. 4, be conditioned upon the filing of revised contracts providing for an initial price of 18 cents per Mcf.

(2) The petition of Hassie Hunt Trust, H. L. Hunt, Hunt Oil Company, William Herbert Hunt Trust Estate, Lamar

Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Company, for rehearing, filed on July 11, 1960, in the above proceedings, is without merit and sets forth no new facts or legal considerations which were not fully considered by the Commission prior to the issuance of our order of July 1, 1960, or which having now been considered, warrant the modifications of said order sought by petitioners.

The Commission orders:

(A) Ordering paragraph (I) of our order of July 1, 1960, in the above proceedings is amended to read as follows: The certificates issued to the producer applicants in ordering paragraph (C) are expressly conditioned upon the filing of revised contracts for the sales from Galveston and Brazoria counties which will be identical to the present contracts except to change the price provisions so that they will provide for an initial price of 20 cents per Mcf with an escalation of 3 cents per Mcf after ten years, and the filing of revised contracts for the sales from Aransas county to provide for an initial price of 18 cents per Mcf.

(B) The time for acceptance of these certificates as fixed by ordering paragraph (F) of our order of July 1, 1960, is extended to twenty days from the date of this order. In all other respects ordering paragraph (F) shall remain unchanged.

(C) Except as modified by this order, our order of July 1, 1960, shall remain unchanged.

(D) The petition for rehearing filed on July 11, 1960, by the producer applicants in the above proceedings is hereby denied.

By the Commission. Commissioner Kline concurring, filed a separate statement. Commissioner Sweeney not participating.

MICHAEL J. FARRELL
Michael J. Farrell,
(Seal) *Acting Secretary*

1416

Docket No. G-19086, *et al.*

PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY AND NATURAL GAS PIPELINE COMPANY OF AMERICA, *et al.*

July 29, 1960

KLINE, Commissioner, *concurring*:

I concur in the action of the Commission in amending our order of July 1, 1960, so as to require the filing of a revised contract containing an initial price of 18¢ per Mcf for those sales made by producers in Aransas County in Texas Railroad District No. 4.

In producer certificate cases involving initial prices, the Commission is attempting to hold the line and to stabilize prices until such time as we have more adequate information concerning their justness and reasonableness. In these proceedings, as in the *Trunkline*[1] case and other cases involving sales made in this area of Texas, all parties have considered the entire Gulf Coast of Texas—Railroad Districts 2, 3 and 4—as one pricing area. The Commission also has viewed this entire area as one district and it was only upon rehearing that we discovered for the first time that we had not previously certificated any producer sales in Railroad Districts 2 and 4 at a price of more than 18¢.

[1] Docket No. G-15395.

One of the biggest problems confronting the Commission in its attempts to hold the line on initial prices has been to determine the boundaries of a particular area in which existing prices should not be exceeded. There are many sound reasons why the entire Gulf Coast of Texas—Railroad Districts 2, 3 and 4—should be treated as one pricing area and it is difficult in many respects to justify an action which will permit a 20¢ price in Galveston and Brazoria Counties in Railroad District No .3 while imposing an 18¢ condition in Aransas County in Railroad District No. 4. However, the gas industry itself has in the past made this distinction by paying lesser prices for gas in areas that were more remote from the market. The primary duty of this Commission is to protect the consumer against excessive prices and by imposing different price conditions in these different railroad districts we can afford the consumers fuller protection than by considering all of the districts as one pricing area. Thus, while I am inclined to believe upon the basis of the knowledge presently available to me, that we will

ultimately treat the entire Gulf Coast as one pricing area, I agree with the majority that the initial price in the Aransas County contracts should at this time be limited to 18¢ per Mcf, which is the highest price we have heretofore certificated in Railroad District No. 4.

It is true that I have taken a different view of this matter in certain areas such as the Panhandle-Hugoton area of Texas, Oklahoma and Kansas where I have felt that the same price limitation should be imposed regardless of the location of the state boundaries, but in cuch instances one common pool of gas extended throughout the entire area or other circumstances existed so that inequities would result if one area were treated differently than another area. A similar factual situation does not exist here.

(1417)

Although I feel we must take this action in order to comply with the holding of the Supreme Court in the *CATCO*[2] case, I am seriously concerned with the effect which our action will have on the flow of gas to the jurisdictional domestic and commercial customers served by interstate pipelines. The 18¢ price at which we are conditioning this sale is considerably below the prices paid by certain large industrial customers not subject to our jurisdiction who purchase gas and transport it in interstate pipelines. We have no jurisdiction over the prices which such large customers pay for this gas and the probable consequence of our action here will be to divert all the remaining gas from the domestic and commercial market to the industrial market. Several years ago Florida Power and Light Company made many large purchases at 19.5¢ per Mcf in Starr, Jim Hogg, Jim Wells, Kennedy and Cleberg Counties in Railroad District No. 4 and has been transporting this gas for industrial use in Florida. Consolidated Edison of New York has purchased large quantities of gas at 19.25¢ per Mcf in Duvall and Bee Counties in Texas Railroad Districts 4 and 2, respectively, for use for industrial purposes in the State of New York. This Commission declined to issue a certificate for the transportation of this gas, which decision was based in part upon the effect which the purchase of the gas would have upon the prices charged by producers selling gas in interstate commerce subject to our jurisdiction. However, we were reversed by the Circuit Court of Appeals for the Third Circuit in this matter and if that decision remains law we are powerless to prevent such purchases.

1418

The large purchases of non-jurisdictional gas now being made by out-of-state industrial users at even higher prices

[2] *Atlantic Refining Co., et al. v. Public Service Commission of N. Y., et al.*, 360 U.S. 378.

and the rapid industrial expansion of this area of Texas with the resultant increased demand for intrastate gas leads me to the conclusion that in a short time there will be no gas available for the jurisdictional interstate market at a price of 18¢.

I also fear that our action here will result in the loss of this entire project. However, legal counsel for the City of Chicago, representing the largest segment of the consuming public which will receive this gas, stated that he would prefer the loss of this gas to payment of the 20¢ price, and under these circumstances I feel we must adhere to the 18¢ price in Railroad District No. 4.

ARTHUR KLINE, *Commissioner*

1419

(Docketed Aug. 3, 1960)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-19086, G-19117 *et al.*

PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY
AND NATURAL GAS PIPELINE COMPANY OF AMERICA

ERRATA NOTICE
(August 3, 1960)

Order Amending Order Issuing Certificates of Public Convenience and Necessity and Denying Petition for Rehearing

(Issued July 29, 1960)

Page 2, second full paragraph, line 6, after the first "No. 4" insert "and Calhoun County in Railroad District No. 2" and after the second "No. 4" insert "and No. 2"

(1419)

Page 2, second full paragraph, line 12, after "No. 4" insert "and No. 2"

Page 3, Finding Paragraph (1), line 5, after "No. 4," insert "and Calhoun County in Railroad District No. 2"

Page 3, Ordering Paragraph (A), line 8, after "Aransas County" insert "and Calhoun County"

MICHAEL J. FARRELL,
Michael J. Farrell,
Acting Secretary

1420

(Filed Aug. 15, 1960)

HUNT OIL COMPANY
700 Mercantile Bank Building
Dallas 1, Texas

Federal Power Commission
441 "G" Street, N. W.
Washington 25, D. C.

ATTENTION: Mr. Joseph H. Gutride, Secretary

Gentlemen:

This filing is made under the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders and without admitting that the Federal Power Commission has jurisdiction over either Hunt Oil Company or the subject matter of this filing, and without prejudice to the rights of Hunt Oil Company to contest the validity of said orders and without prejudice to its rights to contest the jurisdiction of the Commission over the subject matter of this filing.

Pursuant to the provisions of Section 154.92(b) of the Commission's General Rules and Regulations promulgated in the Commission's Order No. 174-B, issued by the Commission on December 17, 1954, as amended, Hunt Oil Company herewith submits in triplicate its filing with the Commission as initial rate schedule the following:

(1) Gas Sales Contract dated May 15, 1959, between Texas Illinois Natural Gas Pipeline Company, as Buyer, and Hunt Oil Company, *et al.*, as Seller.

(2) Amendment dated August 9, 1960, to Gas Sales Contract dated May 15, 1959, by and between Hunt Oil Company, *et al.*, and Peoples Gulf Coast Natural Gas Pipeline Company.

There are enclosed three copies of an estimated bill to the Buyer under the above-listed contract, as amended, showing how the billing amount will be determined.

1421

A complete copy of all material is being sent to the following:

Peoples Gulf Coast Natural Gas Pipeline Company
122 South Michigan Avenue
Chicago 3, Illinois

Placid Oil Company
418 Market Street
Shreveport, Louisiana

William Herbert Hunt Trust Estate
700 Mercantile Bank Building
Dallas 1, Texas

George W. Graham, Inc.
Wichita National Bank Building
Wichita Falls, Texas

With regard to this filing, address communications to the attention of the undersigned.

Yours very truly,

HUNT OIL COMPANY
By: ROBERT W. HENDERSON
Robert W. Henderson, *Attorney*

1422

FPC GAS RATE SCHEDULE No. 55
DOCKET No. *FB
IP No. S-83
FILING DATE: 8-15-60

Gas Sales Contract

THIS CONTRACT made as of the 15th day of May, 1959, by and between TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY, a Delaware corporation, herein called "Pipeline", and HUNT OIL COMPANY, a Delaware corporation, PLACID OIL COMPANY, a Delaware corporation, WILLIAM HERBERT HUNT TRUST ESTATE, whose Trustee is Loyd B. Sands, and GEORGE W. GRAHAM, INC., a Texas corporation, acting herein severally and not jointly but for the convenience hereinafter designated as "Seller";

WITNESSETH:

THAT in consideration of the sum of Ten Dollars ($10.00) paid by Pipeline to Seller, receipt of which is ackowledged, the parties agree as follows:

ARTICLE FIRST
SITUATION AND PURPOSE OF THE PARTIES

1. Pipeline owns and operates a natural gas transportation system extending from the Gulf Coast Area in the

State of Texas to termini in the State of Illinois, and is engaged in the transportation of gas for ultimate consumption in the Chicago Metropolitan Area, Northern Illinois, and other intermediate areas. Pipeline desires to expand the capacity of said transportation system, and Pipeline desires to purchase, pursuant to this contract, a portion of the gas required by Pipeline for the proposed expansion of said system.

2. Seller represents that it owns certain oil and gas leases, mineral rights or interest therein and that it has the right to sell the gas (such term to include casinghead gas) produced therefrom. A list of Seller's leases, mineral rights and/or interests and a map showing the location of the lands covered

thereby are attached hereto and marked Exhibits "A" and "B", respectively, and are hereby made a part hereof.

3. All deposits of natural gas (such term to include all hydrocarbons gaseous at atmospheric pressure and sixty degrees (60°) Fahrenheit, save and except those hereinafter reserved to Seller) underlying Seller's leaseholds and mineral rights at any and all depths, whether such deposits are presently known or hereafter discovered, are herein referred to as the "gas reserves", and said gas reserves are hereby committed by Seller to the performance of this contract.

4. Seller desires to produce natural gas from the gas reserves, gather the same to a central point on Seller's lands and leaseholds in the area shown on Exhibit "B", and may treat and/or process natural gas for the recovery and removal of certain constituents thereof; all as hereinafter provided, and sell the gas remaining to Pipeline, all according to the provisions hereof.

5. Pipeline proposes to expand the capacity of its natural gas transportation system and desires to purchase gas available from Seller's gas reserve and gas from others, and transport same to its market areas.

6. It is understood that Seller may deliver its gas hereunder commingled with gas owned by third parties being sold to Pipeline under separate contracts.

Article Second
Preliminary Acts of the Parties

1. As soon as Pipeline has contracted for sufficient additional gas supply which in its judgment justifies an expansion of its natural gas transportation system, but not later than August 1, 1959, Pipeline will promptly file with the Federal Power Commission an application for a Certificate of Public Convenience and Necessity authorizing an expansion of its

capacity, pursue such application with diligence, and, subject to the provisions of paragraph three (3) below, if said Certificate be issued in a form acceptable to Pipeline, will accept the same; however, in the event Pipeline elects, regardless of the reason, not to accept any Certificate and/or authority tendered to it; such action by Pipeline shall not be questioned or contested by Seller nor shall Pipeline have any liability to Seller as a result of such election.

2. Seller will concurrently with Pipeline file with the Federal Power Commission, if required, an application for a Certificate of Public Convenience and Necessity authorizing the sale provided for herein, pursue such application with diligence; and, subject to the provisions of paragraph three (3) below, if issued in a form in Seller's sole discretion acceptable, will accept same; however, in the event Seller elects, regardless of the reason, not to accept any

Certificate and/or authority tendered to it; such action by Seller shall not be questioned or contested by Pipeline nor shall Seller have any liability to Pipeline as a result of such election.

3. Should either of the above referred-to-Certificates be not issued and accepted by January 1, 1960, either party hereto may upon thirty (30) days' written notice to the other party, given prior to the issuance and acceptance of both Certificates, cancel and terminate this contract.

4. Upon the issuance of the requisite certificates and the acceptance thereof by the respective applicants as provided above, then:

(a) Pipeline agrees promptly to begin and diligently pursue the construction of such facilities as are necessary to receive gas from Seller and transport the same to its markets.

(b) Seller agrees promptly to perform any necessary acts which may be required to deliver gas to Pipeline in accordance with and subject to the terms hereof.

Upon completion by the respective parties of all said facilities, the delivery of gas shall be initiated under the contract, provided, however, if nine (9) months after acceptance by the parties of their Certificates, Pipeline shall not have completed its facilities, Pipeline shall nevertheless

accept delivery or pay for such quantities of gas as Seller then has available for delivery hereunder, as if taken.

ARTICLE THIRD

TERM

1. Subject to the other provisions hereof, the term of this contract shall continue until the expiration of twenty

(20) years (such period herein referred to as the "delivery term"), commencing on the first day of the month following the first delivery of gas under this contract.

2. The date of first delivery of gas hereunder shall be confirmed in writing by Pipeline to Seller.

Article Fourth
Commitment

Seller hereby commits the gas reserves to the performance of this contract, subject to the following reservations and limitations:

(a) Seller agrees to develop and operate the gas reserves and to install, maintain and operate, or cause to be installed, maintained, and operated, a gathering system, dehydrating plant and other equipment and appurtenances; all within the limits required by prudent operation, to the extent necessary to produce and to deliver gas, to satisfy the requirements of this contract. It is understood that the operation of the gas reserves shall be within the exclusive control of Seller, and that nothing herein shall be construed as requiring Seller to perform any drilling operations, reworking of wells, or repair of wells that would be uneconomic from the viewpoint of a prudent operator. Seller shall not be liable for or by

reason of any title failure, subject, however, to Seller's warranty of title covering gas delivered and paid for under this contract. Seller's obligation to deliver gas shall be subject to the ability of Seller's wells to produce without waste and in accordance with prudent oil and gas field practice.

(b) Seller shall have the right to utilize natural gas produced from the gas reserves or gas remaining after treatment, as may be required for Seller's use for fuel in drilling, deepening wells, operating the oil and gas leases and other leases of Seller within two miles of the leases committed hereunder, and to supply gas to Seller's lessors as required by the terms of Seller's oil, gas and mineral leases.

(c) Subject to the other provisions of this subparagraph (c), Seller shall also have the right to use gas for repressuring, pressure maintenance and cycling operations carried on only in the gas reserves; provided, however, that if as a result of such use, Seller is unable to deliver to Pipeline daily the then applicable daily contract quantity, the daily contract quantity shall be reduced accordingly and the delivery term of this contract shall be extended so as to permit Pipeline thereafter to purchase from Seller the total quantity of gas which would have been sold and delivered hereunder during the term hereof, if such operations had not been conducted; and provided further, that Seller

shall conduct operations herein permitted so that the daily contract quantity shall never be reduced by more than 30% of the daily contract quantity applicable prior to such operations. Twelve months prior to such use, Seller shall give written notice to Pipeline, which notice shall contain:

(i) the estimated duration of such use,

(ii) total quantities of gas to be utilized, and

(iii) the probable reduction in daily contract quantity resulting from such use.

If at any time during the period of such use it becomes evident to Seller that information contained in one or more of (i), (ii) or (iii) above is no longer accurate, Seller shall promptly submit a revised notice to Pipeline. Seller shall give Pipeline not less than twelve (12) months' written notice of any increase in daily contract quantity resulting from either a reduction or a termination of such use.

(d) Seller shall have the right to remove from the gas as produced, gasoline and other liquefiable hydrocarbons (other than methane, except such methane unavoidably removed with other liquefiable hydrocarbons) at all times, and from time to time, and in any degree desired by Seller, except that Seller shall not, by the exercise of this right, except for removal of pentanes and heavier hydrocarbons render the gas incapable of meeting the specification for heat content set forth in Article Seventh hereof.

(e) Seller shall have the right to pool, consolidate or utilize any of Seller's leasehold interests with other properties of Sellers and of others, and to alter such consolidated areas or units, in any of which events this contract shall cover Seller's allocated interest in the unitized production.

(f) If at any time the quantity of gas taken by Pipeline hereunder does not permit Seller to maintain withdrawals ratably with withdrawals from the same reservoir by others, and Seller's gas reserves are being drained thereby and are not protected by compensating drainage, Seller shall:

(i) Make a good faith effort to operate its wells, insofar as practicable, so as to vary the gas produc-

duction from the producing horizons in the gas reserves so as to produce gas hereunder in sufficient quantities to offset such drainage; and

(ii) Make application and pursue same with due diligence to the Railroad Commission of Texas, or any other regulatory body having jurisdiction in the premises, for field rules governing the production from such reservoir, for the express purpose of preventing drainage from Seller's gas reserves, and such application shall be consistent with the terms of this contract insofar as such terms are pertinent to the daily volume of gas which Pipeline is obligated to purchase and receive hereunder.

1429

Should these efforts by Seller fail to prevent such drainage, Seller may thereafter request Pipeline to purchase and receive a quantity of gas, over and above the then applicable daily contract quantity, for such time and in such amount as is necessary to offset such drainage. Upon receipt by Pipeline of such request, Pipeline shall purchase and receive such additional quantities for a period of one year. In the event Pipeline elects not to take such additional quantities or any part thereof subsequent to the expiration of said year, it shall so notify Seller six months prior to the end of said year, and Seller shall have the right at the end of said year to have released from this contract only such well/s and acreage attributable thereto as to the producing reservoir from which Seller's gas reserves are being drained, necessary to prevent such drainage. Such acreage attributable to wells shall not exceed the acreage attributable to the wells by the then applicable rules and regulations of the regulatory authority having jurisdiction. If by virtue of the operation of this

sub-paragraph (f) Pipeline shall have purchased volumes of gas over and above the volumes otherwise required to be purchased hereunder, Pipeline shall have the option, when drainage is no longer occurring, to take credit for such volumes and reduce its obligations to purchase gas by such an amount.

(g) Seller shall have the right, prior to the commencement of deliveries hereunder, to sell gas from the gas reserves committed hereto, to third parties, in such quantities as Seller may elect, on a temporary basis, but subject to Pipeline's rights hereunder.

(h) Any other provision in sub-paragraph (f) of this Article Fourth herein contained to the contrary notwithstanding; it is agreed that during any period of this contract in which the applicable law or any regulation of the Railroad Commission of Texas or any other regulatory body having jurisdiction in the premises may make effective an allowable for gas production from Seller's wells in a reservoir in the gas reserves based on oil production from such reservoir, Pipeline agrees to purchase and receive and Seller agrees to sell and deliver the total gas allowable allocated to such wells covered hereunder; provided, however, such quantity of gas shall not, without the consent of Pipeline, exceed sixteen (16) million cubic feet of gas in any one day. It is further agreed that unless otherwise requested by Pipeline, Seller shall at all times operate said wells to the extent permitted by existing regulations so as to deliver as nearly uniform rate of production over each twenty-four hour period as is possible. During any period of this contract in which applicable law or any regulation of the Railroad Commission of Texas or any other regulatory body having jurisdic-

tion in the premises makes effective an allowable for gas produced from Seller's wells in a reservoir in the gas reserves on any basis other than on oil production from such reservoir, it is agreed that the gas produced from such reservoir shall be delivered by Seller and purchased and received by Pipeline under all of the terms and conditions of this

contract other than this sub-paragraph (h).

(i) Seller reserves gas sufficient to satisfy its obligations to deliver to United Carbon Company ,Inc. under the terms of those certain contracts with said company all of which expire December 1, 1961. Seller convenants not to agree to any extension of the term of said contracts.

Article Fifth

Quantity

1. Commencing with the delivery term and continuing thereafter until changed as provided in paragraph 2 of this Article Fifth, Seller agrees to sell and deliver and Pipeline agrees ot purchase and receive, subject to the other provisions of this Article Fifth, daily a quantity of gas averaged over each accounting year ("daily contract quantity") of eleven (11) million cubic feet of gas, less such quantities of gas which Seller is obligated to deliver to United Carbon Company, Inc.

2. After the completion of any reserve study provided for in paragraph 9 of this Article Fifth Pipeline and/or Seller shall have the right to adjust the daily contract quantity to a quantity equal to one million (1,000,000) cubic feet of gas for each eight billion (8,000,000,000) cubic feet of recoverable gas determined to be in place

in Seller's gas reserves as of the date hereof, which quantity shall, subject to the other provisions hereof, then constitute the daily contract quantity; provided, however, the daily contract quantity shall not, without consent of Pipeline, exceed sixteen (16) million cubic feet of gas.

3. The provisions of paragraphs 1 and 2 of this Article Fifth are subject to the limitations that the daily contract quantity shall never be in

excess of seventy-five percent (75%) of the daily quantity of gas that Seller's wells, under prudent methods of operation and applicable rules and regulations of regulatory bodies having jurisdiction, are capable of delivering to Pipeline.

4. To meet the exigencies of its operations, Pipeline may vary its receipts of gas hereunder and shall be entitled on each and every day to receive one hundred thirty-three and one-third percent (133⅓%) but shall receive not less than sixty-six and two-thirds percent (66⅔%) of the daily contract quantity.

5. Should, at the end of any accounting year, Pipeline, subject to credit for deficiencies excused by force majeure, default of Seller, or inability of Seller's wells to produce the daily contract quantity, fail to have taken during such year, the quantities of gas Pipeline is obligated to take hereunder, it shall pay for any deficiencies as if taken. With respect to such deficiencies, the price per one thousand (1,000) cubic feet shall be the same as the price for one thousand (1,000) cubic feet paid by Pipeline for gas actually received from Seller during the same accounting year.

6. In the event that Seller, upon its option, shall have delivered to Pipeline and Pipeline, upon its option, shall

have received gas in excess of the quantities herein provided, same shall be deemed delivered under the contract and shall be paid for accordingly.

7. If Pipeline shall have, during any accounting year, paid for any gas not actually received by it, (including any gas paid for but not taken under paragraph four (4) of Article Second) it shall be entitled to receive such quantities in installments as it may from time to time designate, prior to the end of the next succeeding accounting year, without payment; except Pipeline shall pay the differential in price, if any, between that upon which payments

were made and that applicable at the time of taking; provided, that if Pipeline is unable to receive such gas in such subsequent year due to regulation, inability of Seller's wells, intervention of force majeure, or any condition within the control of Seller, Pipeline shall have such additional time as is necessary to receive such gas. Such gas shall be gas in addition to quantities which Pipeline is obligated to purchase and receive during such period, and Pipeline agrees that the maximum quantity of gas Seller shall be obligated to deliver in any one day shall no exceed one hundred thirty-three and one-third percent (133⅓%) of the then applicable daily contract quantity.

8. For the purpose of this Article, "accounting year" shall mean the twelve-month period commencing on 7:00 A.M. each May 1 during the term of the contract. Settlement for fractional accounting years shall be on a proportionate basis.

9. Twice within twenty-four (24) months from the date of first delivery of gas hereunder, and from time to time thereafter during the delivery term, as either party may

request, but not sooner than two (2) years after any preceding study, Seller and Pipeline shall conduct a joint study of the gas reserves to determine:

(a) The volume of gas contained in the gas reserves as of the date hereof:

(b) The volume of recoverable gas contained in the gas reserves as of the date hereof; and

(c) Whether, considering all relevant factors, there will be available daily during the remainder of the delivery term, quantities of gas in excess of the quantities which Pipeline is entitled to receive hereunder.

In any such study there shall be taken into consideration the probable quantities required to satisfy the reservations of Seller contained in Article Fourth, operating conditions, producing conditions, applicable orders, rules and regulations of regulatory authorities, and any other relevant factors which may bear upon the volumes of gas available for delivery to Pipeline hereunder.

10. In the event Seller and Pipeline are unable to agree upon the results of any study provided for in paragraph nine (9) above, within sixty (60) days after the request for such study, upon demand of either party the matter and all data pertaining thereto shall be submitted to the firm of DeGolyer and MacNaughton, Dallas, Texas, consulting Geologists, or its successor, for determination and the results thereof shall be binding upon the parties hereto. Pipeline and Seller shall each pay one-half (½) of the cost thereof. If either party hereto is dissatisfied with the results of a determination made by the firm of DeGolyer and MacNaughton as provided for in this paragraph 10, said results shall nevertheless apply and be binding upon

the parties hereto until the next reserve study is completed, as provided for in paragraph 9 of this Article Fifth, but either party may demand the selection of another firm to perform the function required of the firm of DeGolyer and MacNaughton in this paragraph 10. If, within ninety (90) days after written demand by one of the parties is received by the other party, the parties are unable to agree upon a mutually acceptable firm, the party making the demand shall appoint an arbitrator, and within thirty (30) days following receipt of written notification of such appointment by the other party, such other party shall appoint a second arbitrator. The two arbitrators so appointed shall meet within thirty (30) days after the latter appointment and select a third arbitrator. The three arbitrators shall, within thirty (30) days after the selection of the third arbitrator, choose a firm recognized in

the industry as qualified to make the determination required by this paragraph 10. Upon written notice of selection, signed by the arbitrator, or a majority of them, naming the firm selected, and upon such firm's agreement to undertake the performance, said firm shall thereafter be used, in any subsequent determination, in lieu of the firm of DeGolyer and MacNaughton. If at any time thereafter either party is dissatisfied with the results of the determination of the reserves by such firm, said results shall nevertheless apply until the completion of the next reserve study provided for in paragraph 9 of this Article Fifth, but either party hereto may request the appointment of another firm, and the procedure outlined herein shall be applicable to such other firm.

11. Seller shall from time to time, at Pipeline's request, furnish Pipeline geological, engineering and production data available to Seller to enable Pipeline to make and

maintain currently its own reserve and deliverability studies.

12. In the event any reserve study reveals that there is recoverable gas in the gas reserves in excess of the amount Pipeline is entitled to receive hereunder during the remainder of the delivery term, and such excess gas is available for delivery without interfering with the delivery of the volumes of gas that Pipeline is entitled to purchase hereunder, Seller shall have the right, after rejection by Pipeline of Seller's written offer to sell such additional gas to Pipeline under the terms hereof, (which offer shall be acted upon within twelve (12) months of its receipt by Pipeline) to sell such additional quantities of gas free of this contract.

Article Sixth

Point of Delivery and Delivery Pressure

1. Subject to the provisions of Article Thirteenth, Seller shall deliver gas hereunder to Pipeline at a mutually agreeable location on Seller's

properties covered hereby. Title to the gas sold hereunder and responsibility for further handling thereof shall pass to Pipeline at such point of delivery.

2. Seller shall deliver gas hereunder at a pressure sufficient to allow the gas to enter Pipeline's transportation system at the working pressures from time to time maintained therein, but not in excess of one thousand (1,000) pounds per square inch gauge. In the event compression is required to accomplish delivery of gas hereunder, Seller shall provide such compression unless in its opinion, acting as a prudent operator, such operation would be uneconomical. If Seller elects not to provide

such compression, Pipeline shall have the right to install the necessary equipment at the most advantageous point on Seller's gathering facilities and perform the required compression. Pipeline shall be entitled to charge Seller for such compression at Pipeline's actual cost thereof, but such charge shall never exceed 25% of the value of the gas so compressed.

* * * * * * * * * *

1442

Article Ninth

Price, Billing and Payment

1. Pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder the prices stated as hereinafter provided: for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents; for gas delivered during the second four (4) year period twenty-two (22) cents; for gas delivered during the third four (4) year period twenty-four (24) cents; for gas delivered during the fourth four (4) year period twenty-six (26) cents; for gas delivered thereafter, twenty-eight (28) cents.

2. After deliveries of gas have commenced, Pipeline shall, on or before the twentieth (20th) day of each month, render to Seller a statement showing the quantity of gas delivered during the preceding calendar month and any adjustments made by Pipeline, and shall pay Seller the amount due for all such gas.

3. Notwithstanding the provisions of paragraph two (2) above, in the event Seller's gas is delivered hereunder commingled with the gas of others, on or before the tenth (10th) day of each month, Pipeline shall render Seller a

statement showing the volume of commingled gas delivered during the preceding calendar month, and within ten days thereafter Seller shall forward or cause to be forwarded to Pipeline a statement, upon which Pipeline may rely, showing the

volume of the commingled gas attributable to Seller and the volumes thereof attributable to parties other than Seller, for the preceding calendar month, the sum of which shall equal the total volume metered by Pipeline. Within ten days thereafter Pipeline shall pay Seller the amount due for gas delivered during the preceding calendar month and shall furnish Seller with sufficient information to explain and support any adjustments made by Pipeline in determining the amount due Seller.

4. Each party hereto shall have the right at all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge computation or demand made under or pursuant to this contract. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

Article Tenth

Taxes

Pipeline shall reimburse Seller for three-fourths (¾) of any increase occurring after the date of this contract, in the total tax paid or payable per one thousand (1,000) cubic feet by Seller and/or Seller's royalty owners, occasioned by any change in the rate, tax base, or basis of computation of the existing production or severance tax or by the imposition or substitution of any new excise tax, including sales, occupation, severance, gathering, or other taxes of

like nature imposed upon Seller in respect to gas delivered under this contract.

ARTICLE ELEVENTH

REGULATORY BODIES

This contract and all operations hereunder are subject to the applicable federal and state laws and the applicable orders, rules and regulations of the Railroad Commission of Texas and of any other state or federal authority

1444

having or asserting jurisdiction; but nothing contained herein shall be construed as a waiver of any right to question or contest any such law, order, rule or regulation in any forum having jurisdiction in the premises.

1461

FPC GAS RATE
SCHEDULE NO. 55
SUPPLEMENT NO. 1
DOCKET NO.
IP NO. S-83
FILING DATE: 8-15-60
EFFECTIVE DATE: 1-25-61

AMENDMENT DATED AS OF AUGUST 9, 1960
TO
GAS SALES CONTRACT
DATED AS OF MAY 15, 1959
FULTON BEACH FIELD
ARANSAS COUNTY, TEXAS

BY THIS INSTUMENT, dated as of August 9, 1960, PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY, successor by assignment to Texas Illinois Natural Gas Pipeline Com-

pany (Buyer), and HUNT OIL COMPANY, a Delaware corporation, PLACID OIL COMPANY, a Delaware corporation, WILLIAM HERBERT HUNT TRUST ESTATE, whose Trustee is Loyd B. Sands, and GEORGE W. GRAHAM, INC., a Texas corporation, acting herein severally and not jointly but for the convenience hereinafter designated as "Seller"; parties to that certain Gas Sales Contract, Fulton Beach Field, Aransas County, Texas, dated as of May 15, 1959, as heretofore amended, in consideration of the mutuality hereof, DO HEREBY COVENANT AND AGREE that said Gas Sales Contract shall be amended in the following particulars, to-wit:

In Paragraph 1 of ARTICLE NINTH, the words:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents;"

are deleted and in substitution therefor the following words are inserted:

> "for gas delivered during the first four years of the delivery term (and any period prior to its commencement) eighteen (18) cents;".

Except as herein amended, all the terms and provisions of said Gas Sales Contract, as amended, shall remain in full force and effect.

1462

EXECUTED as of the day first above written.

PEOPLES GULF COAST NATURAL
GAS PIPELINE COMPANY

By: s/s M. V. BURLINGAME
M. V. Burlingame
Executive Vice President

ATTEST:

s/s J. M. TURRITT
Assistant Secretary

HUNT OIL COMPANY

By: s/s SIDNEY LATHAM
Vice President

ATTEST:

s/s W. B. BIEMAN
Secretary

PLACID OIL COMPANY

By: s/s J. A. GOODSON
Vice President

ATTEST:

s/s B. B. BARBER
Secretary

WILLIAM HERBERT HUNT TRUST ESTATE

By: s/s LOYD B. SANDS
Trustee

APPROVED:

s/s FRED M. MAYER
Member of Advisory Board

GEORGE W. GRAHAM, INC.

By: s/s GEORGE W. GRAHAM
President

ATTEST:

s/s R. A. MORAN
Secretary

SIGNATURE PAGE TO AMENDMENT DATED AS OF AUGUST 9, 1960, TO GAS SALES CONTRACT DATED AS OF MAY 15, 1959, BY AND BETWEEN PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY, AS "PIPELINE," AND HUNT OIL COMPANY, PLACID OIL COMPANY, WILLIAM HERBERT HUNT TRUST ESTATE, AND GEORGE W. GRAHAM, INC., AS "SELLER," COVERING GAS IN THE FULTON BEACH FIELD, ARANSAS COUNTY, TEXAS.

1468

Dallas, Texas
September 30, 1960

To: Peoples Gulf Coast Natural Gas Pipeline Company
122 South Michigan Avenue
Chicago 3, Illinois

In Account With

HUNT OIL COMPANY
700 Mercantile Bank Building
Dallas 1, Texas

Bill No. 0000

We have *charged* your account as follows:

Audit No.

SAMPLE BILLING

Gas delivered to you from the Fulton Beach Field, Aransas County, Texas, during the month of September, 1960:

104,220 MCF @ 18¢ per MCF $18,759.60

1469

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck and Paul A. Sweeney.

Docket No. G-19086
PEOPLES GULF COAST NATURAL GAS PIPELINE COMPANY
AND NATURAL GAS PIPELINE COMPANY OF AMERICA

Docket No. G-19115
HASSIE HUNT TRUST, OPERATOR, ET AL.

Docket No. G-19116
H. L. Hunt, Operator, et al.

Docket No. G-19117
Hunt Oil Company

Docket No. G-19118
William Herbert Hunt Trust Estate, Operator

Docket No. G-19119
Lamar Hunt Trust Estate

Docket No. G-19123
George W. Graham, Inc., Operator, et al.

Docket Nos. G-19124, G-19125
Placid Oil Company, Operator, et al.

Docket No. G-20202
Natural Gas Pipeline Company of America

Docket No. G-20313
Iowa Southern Utilities Company

Docket No. G-20335
Missouri Utilities Company

Docket No. G-20591
City of Corning, Iowa

Docket No. G-20593
Iowa-Illinois Gas and Electric Company

Docket No. CP60-42
Lateral Gas Pipeline Company

Docket No. CP60-43
Iowa Electric Light and Power Company

Docket No. CP60-48
Iowa Power and Light Company

Order Denying Petitions for Rehearing, Stay of Order and Oral Argument

(Issued August 23, 1960)

On July 29, 1960, and August 1, 1960, the City of Chicago and Oklahoma Natural Gas Company, respectively, filed petitions for rehearing of the Commission's order issued July 1, 1960, in the above entitled proceedings. By that order we issued certificates for certain pipeline facilities and services to Peoples Gulf Coast Natural Gas Pipeline Company and Natural Gas Pipeline Company of America and for the sale of natural gas by independent producers to Peoples Gulf Coast. By our order of July 29, 1960, we denied rehearing to the independent producers and amended our order of July 1, 1960 to provide for additional conditions upon the sales by the independent producers.

Petitioners both argue that the proposed expansion by Natural, and especially the 180 mile, 24-inch pipeline between Minneola, Kansas, and Mountain View, Oklahoma, is not supported by an adequate supply showing, is unnecessary to the extent it would idle other facilities, that the necessary additional capacity could be obtained by the construction of less expensive, alternative facilities, and that Natural will use the certificate as a hunting license for gas with a consequent increase in field prices. For all of these reasons petitioners contend that it was error to certificate this line.

1470

On the issue of supply, our staff, in its exihibits, showed that Natural apart from Peoples Gulf Coast, has a fourteen year supply. Combined with Peoples Gulf Coast and including the proposed expansion a supply in excess of twelve years is shown. As petitioners assert, staff did include credit for some short term and spot purchases, but only to

the extent that the ability of the applicants to make such purchases was historically proved.[1] As noted in our order of July 1, 1960, this 12 to 14 year supply showing meets our standard for an established company.

Petitioners in arguing that the facilities proposed are unnecessary aver that annual supplies and the annual capacity of the present line show no need for more capacity on on the line. As we stated in our order of July 1, 1960, the additional markets proposed to be served consist almost entirely of firm, winter space heating customers. The annual average load factor as such has little relation to the capacity needed on a particular line to serve its customers during winter peak periods. Part of the year Natural will have a very low load, but it will have a very high load during the winter months. In this connection there is testimony in the record to the effect that Natural will not only refuse to make additional industrial sales but hopes to reduce those presently made. As a result of this revised plan of operations the annual average load factor may be under 85 percent as indicated by petitioners, but that is not the controlling consideration. The expansion here certificated results in service to more residential and commercial customers which has been recognized to be a preferred use for gas and is consistent with considerations of conservation and the public interest.

Petitioners further argue that, accepting the need for greater capacity, such capacity could be obtained by the construction of alternative facilities with a substantially lower initial investment. In addition to the considerations noted in our order of July 1, 1960, a further review of the record shows that these alternative facilities, while having a lower initial investment cost than the 180 mile

[1] See *United Gas Pipeline Co., et al.*, Docket Nos. G-1447, *et al.*, 10 F.P.C. 35, 46-49, for a discussion of the many factors which we feel are relevant in determining a pipeline's supply situation.

pipeline, would have operational costs which would actually make them substantially as expensive to the consumers as the new pipeline and would not provide the future benefits noted in our July 1, 1960, order. Given approximately equal costs, the pipeline is undoubtedly the more desirable alternative, considering the flexibility and future expansibility which it adds to the system.[2]

1471

Oklahoma Natural also asserts that allowing Natural to construct a pipeline with excess capacity through this part of Oklahoma will, in effect, give Natural a license to hunt for gas and bid up the field prices. This assertion assumes that it is the interstate sales which have caused the upward price trends for gas and that this Commission will do nothing to hold down producer prices.[3] As evidenced in this case by our orders of July 1, and July 29, 1960, we are taking appropriate action on producer prices and there is no basis for Oklahoma Natural's allegation that a new purchaser in an area inevitably means higher prices.

The City of Chicago in its petition for rehearing has urged that we should reconsider the 20-cent per Mcf initial price to the producers for the sales to Peoples Gulf Coast. Chicago insists that this was not shown to be a "fair and reasonable" price for the gas. Our order of July 1, 1960,

---

[2] In *Battle Creek Gas Co.* v. *F.P.C.*, —— F. 2d —— (No. 15368, CADC, decided July 14, 1960), the Court of Appeals for the District of Columbia Circuit held that future, cheap expansibility is a proper consideration for the Commission in certificating pipeline facilities.

[3] When we certificated producer sales at a total price of 16.8 cents to Lone Star Gas Company from the Knox Field in Oklahoma, one of the two controlling considerations was that an intrastate purchaser, Oklahoma Natural, had already bid this price for half of the gas and had contracted to take the rest of the gas at 16.8 cents if we conditioned its interstate sale to a lower price. *Phillips Petroleum Co., et al.*, 22 F.P.C., 528, Docket Nos. G-17897, *et al.*

made it clear that we were not determining a fair or just and reasonable price in this certificate case. Our price conditioning power was used to hold the price line until such a determination can be made. In keeping with this, and on the same day on which Chicago filed its petition for rehearing, we issued our order of July 29, 1960, in which we conditioned a substantial portion of the producer sales to the 18 cents per Mcf price urged by our staff in its brief and by Chicago at the oral argument. Thus, to the extent the producer prices were modified by our July 29, 1960, order, the request of Chicago for reconsideration of the producer prices has, in effect, been granted.

The Commission further finds:

(1) The petitions of the City of Chicago and Oklahoma Natural for rehearing filed on July 29, 1960, and August 1, 1960, respectively, in the above proceedings set forth no new facts or legal considerations which were not fully considered by the Commission prior to the issuance of our order of July 1, 1960, and our amending order of July 29, 1960, or which having now been considered warrant the modifications of the July 1, 1960, order sought by petitioners, except to the extent such order was modified by our order of July 29, 1960.

(2) The stay of our order of July 1, 1960, sought by petitioners, should be denied.

(3) The oral argument on the petitions for rehearing sought by petitioners should be denied.

1472

The Commission orders:

(A) The petitions for rehearing of our order of July 1, 1960, filed by the City of Chicago and Oklahoma Natural Gas Company on July 29, 1960, and August 1, 1960, respectively, are hereby denied.

(B) The stay of our order of July 1, 1960, sought by the City of Chicago and Oklahoma Natural Gas Company, is hereby denied.

(C) The oral argument on the petitions for rehearing, sought by the City of Chicago and Oklahoma Natural Gas Company, is hereby denied.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

1473

FEDERAL POWER COMMISSION
WASHINGTON 25

Sep. 20, 1960

Hunt Oil Company
700 Mercantile Bank Building
Dallas 1, Texas

Gentlemen:

The rate schedules and supplements listed herein have been accepted for filing to be effective on the date of initial delivery. Please return the enclosed duplicate copy with such date inserted in the space provided.

In the event that any of the documents comprising the listed rate schedules and supplements contains provisions for future automatic adjustments in rates and charges, your attention is directed to the fact that such provisions, when invoked to change the effective rates and charges, will constitute a change in such rates and charges within the meaning of Section 4 (d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act. Any such changes should be filed with the Commission

not more than 90 days nor less than 30 days prior to the proposed effective date thereof.

This acceptance for filing does not constitute authorization under Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval of any rate or provisions contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

In future correspondence concerning the listed rate schedule and supplements, please refer to the FPC Gas Rate Schedule designation furnished you herewith, including the name of the independent producer and the rate schedule and supplement numbers.

Very truly yours,

J. H. GUTRIDE
J. H. Gutride
Secretary

Rate Schedule Designation
Hunt Oil Company

Description of Document		Date of Letter of Transmittal	FPC Gas Rate Schedule No.	Supplement No.	Date of Initial Delivery
Contract	5-15-59	Undated	55	–	
Amendment	8-9-60	Undated	55	1	

cc: May, Shannon and Morley, Attorneys
1700 "K" Street, N. W.
Washington 6, D. C.

DK:ha 9-14-60

1474

(Received Feb. 10, 1961)

HUNT OIL COMPANY

700 Mercantile Bank Bldg.
Dallas 1, Texas

February 8, 1961

Federal Power Commission
441 "G" Street, N. W.
Washington 25, D. C.

Gentlemen:

Please be advised that initial deliveries commenced under Hunt Oil Company FPC Rate Schedule No. 55 on January 25, 1961. Enclosed is your Form No. 496.

Yours very truly,

ROBERT W. HENDERSON
Robert W. Henderson
Attorney

js
Enclosure

1475

I P No. 3440

(May 31, 1961)

Hunt Oil Company
Mercantile Bank Building
Dallas, Texas

Attention: Mr. Robert W. Henderson
Attorney

Gentlemen:

This is with reference to your submittal on May 8, 1961 of a notice of change in rate from 18.0¢ to 20.0¢ per Mcf

under your FPC Gas Rate Schedule No. 55. This schedule covers your sale of gas to Natural Gas Pipeline Company of America from the Fulton Beach Field, Aransas County, Texas.

You base your proposed increase upon certain language found on page 14 of the decision of the Court of Appeals for the Fifth Circuit in *Texaco Inc., et al.* v. *Federal Power Commission*, Cause No. 18349, issued April 14, 1961. However, your contract with Natural Gas Pipeline Company dated May 15, 1959, as amended, does not provide for the subject proposed increased rate.

Upon consideration of the facts and circumstances attending the certification in Docket No. G-19117 of your subject sale of gas to Natural Gas Pipeline Company, the amendatory agreement of August 9, 1960 providing for an 18.0 cents per Mcf rate, and the cited court decision, it is concluded that your instant notice of change may not be filed with the Commission.

In view of the foregoing, your May 8, 1961 submittal is improper and is hereby rejected. All copies are returned herewith.

By direction of the Commission.

J. H. Gutride
Secretary

Approved by the Commission

Enclosure No. 97682

cc: Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago 3, Illinois

RGC
JEZ:bjh
5-26-61

1477

(Received June 26, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. G-19117
FPC Gas Rate Schedule No. 55

In the Matter of:
HUNT OIL COMPANY

Application for Rehearing and Reconsideration

COMES NOW HUNT OIL COMPANY (hereinafter referred to as Petitioner) pursuant to the provisions of Section 19(a) of the Natural Gas Act, Section 1.34 of the Commission's Rules of Practice and Procedure, and files this Application for Rehearing and Reconsideration of the Commission's Letter Order issued May 31, 1961, in the captioned docket. In support of this Application, Petitioner would show as follows:

I.

STATUS OF PROCEEDING

On May 8, 1961, Petitioner filed a Notice of Change in its FPC Gas Rate Schedule No. 55 providing for an increase in price from 18¢ to 20¢ per MCF. This Rate Schedule covers a sale of gas to Natural Gas Pipeline Company of America (herein referred to as Natural), from the Fulton Beach Field,

1478

Aransas County, Texas. The sale being made pursuant to the terms of said Rate Schedule No. 55 was certificated in Docket No. G-19117 by order issued July 1, 1960.

In issuing the Certificate of Public Convenience and Necessity, the Commission conditioned the initial price to 18¢ per MCF. Ordering Paragraph (A) of the amended Order granting Certificate of Public Convenience and Necessity issued July 29, 1960, provides as follows:

> "Ordering paragraph (I) of our Order of July 1, 1960, in the above proceedings is amended to read as follows: The certificates issued to the producer applicants in ordering paragraph (C) are expressly conditioned upon . . . the filing of revised contracts for the sales from Aransas County to provide for an initial price of 18 cents per MCF."

On August 15, 1960, the Petitioner filed its Accepance of the condition imposed, and pursuant to said Order, submitted an Amendment dated August 9, 1960, to Gas Sales Contract which comprises the said Rate Schedule No. 55. This Amendment between Petitioner and its pipeline purchaser was executed for the sole purpose of complying with the Commission's Order. It was completely unsupported by other consideration and was not intended to abrogate contractual obligations existing between Petitioner and its pipeline purchaser.

Pursuant to the contractual obligations of Petitioner's FPC Gas Rate Schedule No. 55, Petitioner filed the aforementioned Notice of Change in Rate. By Letter Order issued May 31, 1961, the Commission rejected said Notice of Change and refused to permit the filing of same.

II.

Basis of Application

It is Petitioner's position that the Commission erred in the issuance of its Letter Order dated May 31, 1961, by

rejecting the Petitioner's Notice of Change filing. Such action exceeded the Commission's statutory authority under the Natural Gas Act; it is arbitrary, capricious, unreasonable, contrary to the public interest, and confiscates Petitioner's property without due process of law.

III.

ARGUMENT

The Natural Gas Act does not give the Commission the authority to reject a Notice of Change which is in complicance with all the statutory requirements and which is predicated upon a contractual agreement by the parties to the sale. Certainly Section 4 of the Act gives the Commission the power to suspend an increase in price which may be unjust and

unreasonable and to hold a hearing to determine whether such increase is justified, but under no circumstances may the Commission flatly reject a Notice of Change filing which complies with all the statutory filing requirements. The statute leaves no room for administrative discretion. Thus, when Petitioner's Notice of Change was filed on May 8, 1961, the Commission had two alternatives, either accept or suspend said increase in rate. The only possible reason that the Commission could have had for returning such filing was its failure to comply with the Commission's specified rules and regulations. In this instance, this was not the basis for the Commission's rejection of Petitioner's filing. Thus, the Commission's arbitrary rejection of said filing exceeds its statutory authority.

The Commission cannot, under the guise of attaching price conditions, abrogate contractual obligations. The mere fact that the original 20¢ price was conditioned to 18¢ does not alter the contractual obligations existing be-

tween Petitioner and its pipeline purchaser. As a result of these contractual obligations, Petitioner has the right under Section 4 of the Natural Gas Act, to file for an increase in price which is consistent with such contractual obligations, and to justify,

1481

if required to do so, such proposed increase. Any doubt as to this point was resolved by *Texaco, Inc. vs. Federal Power Commission,* Fed. 2nd , (5th Cir., 1961) wherein the Court, when confronted with the very same issue, stated:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per MCF after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here. El Paso has voluntarily agreed by contract to pay 20 cents initially for a period of five years. The fact that the Commission has required its producers to deliver to it at 17.7 cents does not, it seems to us, amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny to the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to. It does not follow that if producers are thereafter able to make a record in a section 4(e) proceeding that would warrant the Commission's finding 20 cents to be just and reasonable rate that the Commission would be powerless to make such a finding

> and approve such rate because of any contractual relations between the producers and El Paso."

Petitioner submits that the Commission's action in rejecting the subject Notice of Change is directly contra to the foregoing language. If not, why not? If the Commission's action is consistent with the Fifth Circuit in this regard,

then the foregoing language means absolutely nothing. Needless to say, the honorable court was not speaking through its hat. Its pronouncement was intended to be authoritative and followed.

The public convenience and necessity does not require any action by the Commission which denies Petitioner or any other producer of natural gas, the right to establish, collect, or justify, just and reasonable prices which have been agreed upon by Petitioner and its pipeline purchaser. Such action deprives Petitioner of valuable property rights without due process of law. Such summary judgment as to the justification of proposed increases is arbitrary, capricious, and contrary to the public interest. Petitioner submits that the Commission's action invades the area of price determination. The Supreme Court has made clear that the Commission's function regarding increases in prices is that of reviewing rates rather than setting rates. This was clearly illustrated in *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 76 Sup. Ct. 373, 350 US 332 (1956):

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 US 338)

1483

"... In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for review by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (350 US 343)

The Supreme Court does not construe the Natural Gas Act as granting the Commission the authority to change the pricing structure agreed upon by the parties. It is submitted that the Commission's rejection of Petitioner's Notice of Change filing has the effect of substituting a Commission arbitrarily determined rate for that agreed upon by Petitioner and its pipeline purchaser.

The seriousness of such an arbitrary and capricious departure from the Natural Gas Act is the confiscating effect upon Petitioner's property rights. Summarily, the Commission has deprived Petitioner of a portion of the economic value of its gas. The tragedy of such action is in the fact that it could have been avoided. The Commission could have given the consumer the same protection he now has by the use of Section 4 of the Natural Gas Act, without such a confiscatory disregard of Petitioner's property rights. Unless the Commission's action is reversed, then Petitioner will be forever deprived of the revennes to which it's contractually entitled.

1484

IV.

Conclusion

Wherefore, for the foregoing reasons, Petitioner requests that the Commission reconsider the issuance of its

(1484)

Letter Order dated May 31, 1961, and accept for filing, the Petitioner's aforementioned Notice of Change in Rate; and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

HUNT OIL COMPANY

By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

1487

(Received June 30, 1961)

HUNT OIL COMPANY
700 Mercantile Bank Bldg.
Dallas 1, Texas

June 29, 1961

Federal Power Commission
441 "G" Street, N. W.
Washington, D. C.

Attention: Mr. Joseph H. Gutride, Secretary

Gentlemen:

This is with reference to your rejection by Letter Order dated May 31, 1961, of a Notice of Change in Hunt Oil Company's FPC Gas Rate Schedule No. 55. This Rate Schedule covers a sale of gas to Natural Gas Pipeline Company of America from the Fulton Beach Field, Aransas County, Texas.

On June 26, 1961, Hunt Oil Company filed an Application for Rehearing and Reconsideration of the Letter Order issued May 31, 1961. In connection with the request that the Commission accept for filing said Notice of Change in Rate,

Hunt Oil Company retenders three (3) copies of said Notice of Change in its FPC Gas Rate Schedule No. 55. For the reasons set forth in said Application for Rehearing and Reconsideration, Hunt Oil Company is confident that the Commission will accept same for filing.

Please stamp one conformed copy of said filing "Received" and return to us in the enclosed stamped addressed envelope.

Yours very truly,

HUNT OIL COMPANY

By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

TGC/ca

1489

(Received June 30, 1961)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

Docket No. G-19117
FPC Gas Rate Schedule No. 55

In the Matter of:
HUNT OIL COMPANY

Supplement to Application for Rehearing and Reconsideration

COMES NOW HUNT OIL COMPANY (hereinafter referred to as Petitioner) and files a Supplement to the Application for Rehearing and Reconsideration filed with the Commission on June 26, 1961, wherein the Commission was requested to reconsider its Letter Order issued May 31, 1961, insofar as said Order rejects for filing Petitioner's

tender of a Notice of Change in its FPC Gas Rate Schedule No. 55.

As a Supplement to said Application for Rehearing and Reconsideration, Petitioner submits a copy of the Notice of Change filing which was the subject of the Commission's Letter Order dated May 31, 1961. Said Notice of Change is attached hereto as Exhibit "A", and incorporated herein by reference; it is submitted for convenience so that the Commission might have before it a copy of the rejected filing. In connection

1490

with relief requested by Petitioner's Application for Rehearing and Reconsideration, Petitioner is re-submitting under separate cover the filing which has been rejected. For the reasons set forth in its Application for Rehearing, Petitioner is confident the Commission will accept same for filing.

Petitioner again renews its request that the Commission reconsider the issuance of its Letter Order issued May 31, 1961, and accept for filing the subject Notice of Change in Rate; and, Petitioner requests such further and other relief to which it may be entitled either at law or in equity.

Respectfully submitted,

HUNT OIL COMPANY

By THOMAS G. CROUCH
Thomas G. Crouch, *Attorney*

1493

(Received May 8, 1961)

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D. C.

In the Matter of:
HUNT OIL COMPANY

NOTICE OF CHANGE IN RATE

Hunt Oil Company
FPC Gas Rate Schedule No. 55
Supplement No. 2

Subject to all of the conditions, limitations and reservations set forth in previous filings of Hunt Oil Company and hereinafter set forth, and pursuant to the provisions of Section 154.94 of the Commission's Rules and Regulations, as amended, Hunt Oil Company (hereinafter designated as "Seller") hereby files, in triplicate, this Supplement No. 2 to its FPC Gas Rate Schedule No. 55.

In compliance with the provisions of Section 154.94 (e), the following information is submitted with respect to this filing. A statement of reasons, nature and basis of the change proposed herein is set forth in Exhibit "A" attached hereto and incorporated herein by reference.

(i) This change in rate is made on behalf of Hunt Oil Company only and is intended to be a supplement to its FPC

1494

Gas Rate Schedule No. 55. The date on which the change is proposed to be made effective is May 8, 1961; therefore, it is requested that this supplement be accepted to be effective as of that

date and that a waiver of the thirty-day notice requirement be granted under Section 154.98 of the Commission's Regulations.

(ii) The name of the purchaser is Natural Gas Pipeline Company of America (hereinafter referred to as "Natural") (predecessor in interest being Peoples Gulf Coast Natural Gas Pipeline Company, the successor to Texas Illinois Natural Gas Pipeline Company).

(iii) Article Ninth (Price, Billing and Payment) of that certain Gas Sales Contract dated May 15, 1959, which comprises the subject rate schedule is the contract provision authorizing the change proposed herein. This provision is quoted in full in the Statement of Reasons, Nature and Basis of Change attached hereto as

1495

Exhbit "A", to which reference is here made for all purposes.

(iv) Delivery is made under the subject rate schedule in the Fulton Beach Field, Aransas County, Texas.

(v) The present total effective price on May 7, 1961, is 18¢ per MCF at 14.65 psia.

(vi) There are no deductions by Natural from the present price for amortization, dehydration, gathering, treating, etc.

(vii) The proposed total price to be effective May 8, 1961, is 20¢ per MCF at 14.65 psia.

(viii) There are no deductions by Natural from the proposed price for amortization, dehydration, gathering, treating, etc.

(ix) There is attached hereto as Exhibit "B" a comparative statement of sales made and revenues therefrom by months under the rate schedule effec-

tive from the date of initial deliveries for the four months preceding and

1496

for the twelve months immediately succeeding the date when the change is effective. Estimates are used where actual data is not available. All computations and accounting shown in Exhibit "B" are based on the volume of gas sold from the wells, including royalty, attributable to the interest of Seller.

This filing is made under the claimed authority of the Federal Power Commission asserted in Order No. 174-B, as amended, without admitting the validity of such orders and without admitting that the Federal Power Commission has jurisdiction over either the undersigned Seller or the subject matter of this filing, and without prejudice to the rights of the undersigned Seller to contest the validity of said orders, and without prejudice to Seller's rights to contest the jurisdiction of the Commission over the subject matter of this filing.

If the Commission in its discretion suspends the increase in price, it is respectfully requested that the five-month suspension period be waived and that a suspension of one day only be ordered. The reasons for this request, as well as the request for the waiver of the thirty-day notice provision of Section 154.98, are set forth in the attached Exhibit "A".

1497

Please address all communications relating to this filing to the undersigned.

Respectfully submitted,

HUNT OIL COMPANY

By ROBERT W. HENDERSON

Robert W. Henderson

Attorney

EXHIBIT "A"

STATEMENT OF REASONS, NATURE AND BASIS FOR THE PROPOSED CHANGE

Seller entered into that certain Gas Sales Contract dated May 15, 1959, by and between Texas Illinois Natural Gas Pipeline Company, as Purchaser, and Hunt Oil Company, *et al.*, as Seller. On July 31, 1959, under Docket No. G-19117, Seller filed its Application for a Certificate of Public Convenience and Necessity. By Order of this Commission issued July 1, 1960, as amended by Order issued July 29, 1960, under Docket Nos. G-19086, *et al.*, in the Matters of Peoples Gulf Coast Natural Gas Pipeline Company, *et al.*, Seller was granted a Certificate of Public Convenience and Necessity to make sales under its FPC Gas Rate Schedule No. 55 subject to the condition that the initial price of 20¢ per MCF at 14.65 psia be reduced to 18¢ per MCF at 14.65 psia. Ordering Paragraph (A) of the amended Order issued July 29, 1960, provides:

> "Ordering paragraph (I) of our Order of July 1, 1960, in the above proceedings is amended to read as follows: The certificates issued to the producer applicants in ordering paragraph (C) are expressly conditioned upon . . . the filing of revised contracts for the sales from Aransas county to provide for an initial price of 18 cents per Mcf."

On August 15, 1960, under compulsion of the Commission's previous Orders, Seller filed its Acceptance of the

Certificate of Public Convenience and Necessity which had attached an Amendment dated August 9, 1960, to the Gas Sales Contract of May 15, 1959. The Amendment of

August 9, 1960, reduced the initial price of 20¢ per MCF to 18¢ per MCF in the following language:

"In Paragraph 1 of ARTICLE NINTH, the words:

"'for gas delivered during the first four years of the delivery term (and any period prior to its commencement) twenty (20) cents;'

"are deleted and in substitution therefor the following words are inserted:

"'for gas delivered during the first four years of the delivery term (and any period prior to its commencement) eighteen (18) cents;'."

The Amendment between Seller and Peoples Gulf Coast Natural Gas Pipeline Company was entered into for the sole purpose of complying with the Commission's Order and was completely unsupported by any other consideration.

This Commission has required Seller to reduce its initial price even though Seller is of the opinion that its contractual initial price of 20¢ per MCF was a just and reasonable price. Seller has been denied the benefit of the revenues attributable to the 2¢ reduction from the date of first deliveries to date. Under the conditions prior to the filing of this Notice of Change, Seller is losing revenues which never can be recouped from the pipeline purchaser even though

the contracted 20¢ price is later found to be a just and reasonable price.

The filing of this Notice of Change is supported by the language of the Court of Appeals for the Fifth Circuit in

(1500)

Texaco Inc., et al. v. *Federal Power Commission,* Cause No. 18349, decided April 14, 1961. The language is as follows:

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract. None of the reasons which caused the Supreme Court to reject the rate increase in Mobile is relevant here." (Page 14)

The consumer is adequately protected, but prior to filing this Notice of Change, Seller has not been adequately protected. Seller already has delivered volumes of gas to Natural for over four months at the price of 18¢ per MCF. If the Commission in its discretion suspends the increase in price, there is no need for the Commission to suspend the increase in price for a period of five months since Seller already has suffered a loss in revenues of 2¢ per MCF attributable to the volumes sold from the date of first deliveries to the present. Under these circumstances where Seller's Notice of Change is being filed over four months late, this Commission is requested to waive the thirty-day notice

1501

requirement and accept this Notice of Change as being effective on the date of filing.

It is Seller's position that the 20¢ price to which the increase is being filed is a just and reasonable rate and is in the public interest.

1502

EXHIBIT "B"

COMPARATIVE STATEMENT OF REVENUES AT THE PRESENT RATE AND PROPOSED RATE FOR 4 MONTHS PRIOR AND 12 MONTHS SUBSEQUENT TO MAY 8, 1961

SELLER: Hunt Oil Company (FPC Gas Rate Schedule No. 55)
BUYER: Natural Gas Pipeline Company of America
FIELD: Fulton Beach, Aransas County, Texas

Year	Month	Mcf	Present Rate Per Mcf 18¢	Proposed Rate Per Mcf 20¢
1961	January	8,818	$ 1,587.24	$ 1,763.60
	February	80,754	14,535.72	16,150.80
	March	160,752	28,935.36	32,150.40
	*April	160,766	28,937.88	32,153.20
4 months prior to May 8, 1961		411,090	$ 73,996.20	$ 82,218.00
1961	*May	104,220	$ 18,759.60	$ 20,844.00
	*June	104,220	18,759.60	20,844.00
	*July	104,220	18,759.60	20,844.00
	*August	104,220	18,759.60	20,844.00
	*September	104,220	18,759.60	20,844.00
	*October	104,220	18,759.60	20,844.00
	*November	104,220	18,759.60	20,844.00
	*December	104,220	18,759.60	20,844.00
1962	*January	104,220	18,759.60	20,844.00
	*February	104,220	18,759.60	20,844.00
	*March	104,220	18,759.60	20,844.00
	*April	104,220	18,759.60	20,844.00
12 months subsequent to May 8, 1961		1,250,640	$225,115.20	$250,128.00

* Estimated.

1505

(Docketed July 26, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Arthur Kline Joseph C. Swidler and Howard Morgan.

HUNT OIL COMPANY

v.

Order Rejecting Rate Filing and Denying Motion for Reconsideration

(Issued July 26, 1961)

On June 26, 1961, Hunt Oil Company (Hunt) filed an application for hearing and reconsideration of a letter order which rejected a notice of change[1] to Hunt's FPC Gas Rate Schedule No. 55 and on June 30, 1961, Hunt resubmitted the aforementioned rejected notice of change.

Hunt's FPC Gas Rate Schedule No. 55 pertains to gas produced from the Fulton Beach Field, Aransas County, Texas, and sold to Natural Gas Pipeline Company of America. Said sale was authorized by order issued on July 1, 1960, in Docket No. G-19117, and amended by order issued therein on July 29, 1960. The Commission by said orders granted the certificate of public convenience therein sought on condition that the initial price for the gas sold be reduced from 20¢ to 18¢ per Mcf.

On August 15, 1960, Hunt concurrently filed an acceptance of the certificate of public convenience and necessity granted by the aforementioned orders and a rate filing applicable to the proposed sale composed of a gas sales contract dated May 15, 1959, and an amendment thereto dated August 9, 1960. The rate filings were accepted for

[1] Supplemented by a tender of June 30, 1961.

filing, were designated as Hunt's FPC Gas Rate Schedule No. 55 and Supplement No. 1 thereto and were declared effective as of January 25, 1961, the date of initial delivery under the rate schedule.

The rate schedule provides:

> Article 9 (1)—"pipeline shall pay for each one thousand (1,000) cubic feet of gas delivered hereunder the prices stated as hereinafter provided: for gas delivered during the first four years of the delivery term . . . twenty (20) cents . . ."

Not inconsistent with the aforementioned orders granting the certificate of public convenience and necessity, Hunt tendered Supplement No. 1 to the rate schedule which provides that the aforementioned "20¢" be reduced to "18¢" and that "except as herein amended, all terms and provisions of said Gas Sales Contract, as amended, shall remain in full force and effect." Thus, Hunt's contract now provides for an initial rate of 18¢ per Mcf and contains no provision for an incremental increase for a period of four years.

However, on May 8, 1961, Hunt tendered a notice of change proposing to increase the level of rate from 18¢ to 20¢ per Mcf. By letter order dated May 31, 1961, the Commission rejected said notice of change stating "Upon consideration of all the facts and circumstances attending the certification in Docket No. G-19117 . . ., of the amendatory agreement of August 9, 1960 . . ., it is concluded that your instant notice of change may not be filed with the Commission." On June 26, 1961, Hunt tendered its application for rehearing and reconsideration, subsequently amended, and on June 30, 1961, retendered the notice of change rejected by the aforesaid letter order of May 31, 1961.

In support of its petition Hunt, citing certain *obiter dictum* in a recent court decision,[2] states the "Commission cannot, under guise of attaching price conditions, abrogate contractual obligations. Hunt alleges that the mere fact that the original 20¢ price was conditioned to 18¢ does not alter the contractual obligations existing between Petitioner and its pipeline purchaser. As a result of these contractual obligations, Petitioner claims that it has a right under Section 4 of the Natural Gas Act, to file for an increase in price which is consistent with such contractual obligations, and to justify, if required to do so, such proposed increase."

We do not think Hunt's notice of change is consistent with its contractual rights and obligations. As to Hunt's assertion of right to make this filing we think it sufficient to refer Hunt to the *Mobile* case wherein the Supreme Court in adjudging this very point stated "we hold that the Natural Gas Act does not give natural gas companies the right to change rate contracts by their own unilateral action".[3]

Hunt's reliance on the court decision in the Texaco case is misplaced. The certificate condition imposed by the Commission on the independent producers in the Texaco proceeding, to which the court referred in

Texaco, Inc. v. *F.P.C.*, and the certificate condition imposed by the Commission in the instant Hunt certificate proceeding are entirely different. By the certificate condition imposed in the Texaco proceeding the Commission permitted the independent producers to make unilateral filings of

[2] *Texaco, Inc.* v. *F.P.C., et al.*, (CA 5, case No. 18349, issued April 14, 1961).

[3] *United Gas Co.* v. *F.P.C.*, 350 U.S. 332, 337.

lower initial rates.[4] On the other hand, Hunt was required to file a revised contract providing for an 18¢ per Mcf rate as a condition to the issuance of a permanent certificate.[5] Thus, unlike the independent producers in the Texaco proceeding, Hunt has amended its contract to provide for an 18¢ per Mcf rate. Therefore, the 20¢ per Mcf rate provided for in the original contract is no longer contained in Hunt's contract. Under these circumstances, there is no contractual basis upon which Hunt may file for an increased rate of 20¢ per Mcf at this time.

The Commission finds:

For the reasons heretofore stated as well as those set forth in the aforementioned letter order dated May 31, 1961, it is in the public interest and necessary in the proper enforcement of the Natural Gas Act, that Hunt's application for rehearing and reconsideration should be denied and that the notice of change retendered on June 30, 1961, should be rejected.

The Commission orders:

Hunt's aforementioned application for rehearing and reconsideration is hereby denied and the notice of change to its FPC Gas Rate Schedule No. 55 retendered on June 30, 1961, is hereby rejected.

By the Commission.

J. H. Gutride
Joseph H. Gutride,
Secretary

(Seal)

---

[4] See Opinion No. 335, *El Paso Natural Gas Company, et al.*, Docket Nos. G-13862, *et al.*, order issued February 23, 1960.

[5] See *Peoples Gulf Coast Natural Gas Pipeline Company, et al.*, Docket Nos. G-19086, *et al.*, order issued July 29, 1960.

1508

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Jerome K. Kuykendall, Howard Morgan, L. J. O'Connor, Jr. and Charles R. Ross.

Docket No. G-19115
HASSIE HUNT TRUST, OPERATOR, ET AL.

Docket No. G-19116
H. L. HUNT, OPERATOR, ET AL.

Docket No. G-19117
HUNT OIL COMPANY

Docket No. G-19118
WILLIAM HERBERT HUNT TRUST ESTATE, OPERATOR

Docket No. G-19119
LAMAR HUNT TRUST ESTATE

Docket No. G-19123
GEORGE W. GRAHAM, INC., OPERATOR, ET AL.

Docket Nos. G-19124, G-19125
PLACID OIL COMPANY, OPERATOR, ET AL.

Order Granting Intervention, Setting Aside Certificates and Issuing Temporary Authorizations

(Issued November 2, 1961)

By order in the above-entitled dockets, 24 FPC 1, as amended 24 FPC 106, we issued certificates of public convenience and necessity to the above-listed independent producers, authorizing sales of natural gas in interstate commerce for resale, together with the construction and operation of any facilities subject to the jurisdiction of the Com-

mission used for the sale of natural gas by them in interstate commerce.

Certificates were issued to Hunt Oil Co., William Herbert Hunt Trust Estate, Lamar Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Company for sales from Aransas County in Texas Railroad District No. 4, and Calhoun County in Texas Railroad District No. 2 conditioned upon the filing of revised contracts providing for an initial price of 18 cents per Mcf. Certificates were issued to Hassie Hunt Trust, Operator, *et al.*, Hunt Oil Company, William Herbert Hunt Trust Estate, Lamar Hunt Trust Estate, George W. Graham, Inc., and Placid Oil Company for sales from Galveston and Brazoria Counties in Texas Railroad District No. 3 conditioned upon the filing of contracts providing for an inital price of 20 cents per Mcf with an escalation of 3 cents per Mcf after ten years, rather than the four year period which had been in the initial contract upon which certification had been sought. (24 FPC 106, 107). Contracts were filed as Rate Schedules in accordance with the conditioned certificates and service of natural gas was begun thereunder by each of the above-named producers.

1509

On February 10, 1960, The Public Service Commission of the State of New York (PSC) filed a notice of intervention in the above named proceedings. Intervention was denied on March 21, 1960. PSC's application for rehearing was denied by order of the Commission issued May 5, 1960. On July 1, 1960 PSC filed a petition for review of these orders in the United States Court of Appeals for the District of Columbia Circuit. In *Public Service Commission of New York* v. *F.P.C.*, CADC No. 15854, decided June 15, 1961, the Court set aside our orders and remanded the cases for further proceedings.

In light of the Court's decision, we find that PSC should be permitted to intervene in all of the above-entitled dockets, that the certificates heretofore issued to the independent producers listed above in these proceedings should be set aside, that PSC should be granted opportunity to present its position and that redetermination be made of the issues presented in these proceedings.

Such redetermination cannot immediately be accomplished. In the interim, in light of the obligation of the above-listed producers to continue service, in view of the requirement that any abandonment of such service be accomplished only after permission is granted under Section 7(b) of the Natural Gas Act, we shall temporarily authorize the continuation of sale herein, so that the producers shall not be in violation of the Act. We recognize that the producers commenced deliveries of gas in these proceedings in good faith. However, until such time as a final decision is rendered herein, we shall condition the temporary authorizations issued herein by requiring the refund to Natural Gas Pipeline Company of America[1] of any amounts collected after the date of issuance of this order in excess of the amount computed at the rate determined to be required by the public convenience and necessity in such further proceedings as may be held in this matter.

The Commission further finds:

It is desirable to allow the Public Service Commission of the State of New York to intervene as requested in the various above-listed dockets in this proceeding in order that it may establish the facts and law from which the

[1] Natural Gas Pipeline Company of America became the successor to Peoples Gulf Coast Natural Gas Pipeline Company by merger effective October 10, 1960.

nature and validity of its alleged rights and interests may be determined and show what further action may be appropriate under the circumstances in the administration of the Natural Gas Act.

1510

The Commission orders:

(A) The Public Service Commission of the State of New York be and it is hereby permitted to become an intervener as requested in the above-listed dockets in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that the participation of such intervener shall be limited to matters affecting asserted rights and interests as specifically set forth in said notice of intervention and application for rehearing and *Provided, further,* that the admission of the Public Service Commission of the State of New York shall not be con-construed as recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The Public Service Commission of the State of New York shall submit on or before November 30, 1961, a statement setting forth the issues it finds in the proceeding, its position thereon and an outline of the evidence which it will present in support of said position.

(C) Our order of July 1, 1960, as amended on July 29, 1960, is hereby set aside insofar as it issues permanent certificates of public convenience and necessity in Docket Nos. G-19115, G-19116, G-19117, G-19118, G-19119, G-19123, G-19124 and G-19125.

(D) Temporary authorization is hereby issued to Hassie Hunt Trust, Operator, *et al.*, in Docket No. G-19115, H. L. Hunt, Operator, *et al.*, in Docket No. G-19116, Hunt Oil

Company in Docket No. G-19117, William Herbert Hunt Trust Estate, Operator, in Docket No. G-19118, Lamar Hunt Trust Estate in Docket No. G-19119, George W. Graham, Inc., Operator, *et al.*, in Docket No. G-19123 and Placid Oil Company, Operator, *et al.*, in Docket Nos. G-19124 and G-19125 upon the conditions (1) that each producer refund to Natural Gas Pipeline Company of America any amounts collected after the date of issuance of this order in excess of the amount computed at the rate determined to be required by the public convenience and necessity in the above-listed proceeding; (2) that the initial rates set forth in our order of July 29, 1960, 24 FPC 106, shall remain in effect until changed by Commission order in this proceeding.

(C) The Secretary of the Commission is hereby directed to file a copy of this order as part of the applicable rate schedule for each of the above listed independent producers.

By the Commission.

J. H. Gutride
Joseph H. Gutride,
Secretary

323 In the United States Court of Appeals for the Fifth Circuit

Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19156, 19212, 19213, 19214

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; NELSON BUNKER HUNT, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petitions for Review of Orders of the Federal Power Commission

Opinion July 19, 1962

Before BROWN, WISDOM and BELL, Circuit Judges.

BROWN, Circuit Judge: These cases raise the common question of whether the Federal Power Commission in granting a temporary certificate for the sale of natural gas at a specified initial sales price may lawfully prescribe as a condition
324 that such price may not be increased without express approval of the Commission. The effect of such a condition is to deny to the producer the opportunity of filing a § 4(d)(e) subsequent rate increase. We hold that the Commission may not thus effectually condition-out a statutory right which Congress has prescribed. We therefore sustain the attack of the Producers who petition for review and reverse the Orders of the Commission.

While this question is almost submerged in the seemingly unavoidable flood of papers which consumes another natural resource while adjudicating this one, each of these ten separate petitions for review and the underlying orders, petitions for rehearing, orders on rehearing, and post-certification orders present substantially the same facts. Fortunately, what we can readily identify as the natural gas Bar shows a commendable cooperation in streamlining into a single consolidated record and consolidated briefs and argument all of the

712-103—63——1

essential materials—but no more—without costly repetition or duplication.[1]

While, as we stated, these involve many different dockets concerning rates or sales in the Alvin, Alta Loma and
325 Chenango Fields within the Texas Railroad District No. 3, for all practical purposes the cases are the same and present this one basic question. Moreover, very little factual detail even as to a typical case is needed. Some dates and times are, however, important in showing the sequence and to pinpoint the complaints of the Producer. A brief synopsis of the Alta Loma proceedings will suffice.[2]

On July 1, 1960, the Commission issued a permanent certificate under § 7(e) to the Producer for the sale of gas to the pipeline purchaser. The rate prescribed was 20¢ Mcf. The 20-year contract as originally proposed called for an initial price of 20¢ with four escalations of 2¢ each every four years. In granting the permanent certificate, the Commission required that this be altered by prescribing a single 3¢ escalation at the end of the first ten years. This was accepted and service commenced. That Order, as such, is not under review in these cases.

Thereafter new production was brought in on this pooled gas unit. On December 15, 1960, the Producer entered into individual gas sales contracts with the Pipeline purchaser for the sale of this additional gas. The price fixed was 20¢ Mcf, but with four 2¢ escalations.[3] Thereafter on February
326 27, 1961, the Producer applied to the Commission for a Certificate of Public Convenience and Necessity to make these sales. It sought also temporary authorization to begin

[1] The procedure worked out by trial and error and a good deal of give and take by the Solicitor of the Commission, counsel representing various parties and intervenors, and our Clerk over the past five-years in the handling of these complicated records in natural gas cases is the source for our recently adopted rule prescribing a like optional procedure for general cases. The essence of it is that briefs are exchanged before the record is printed so that counsel, in thereafter jointly designating the printed record, know exactly what is, and is not, presented. Thus, in this case covering these ten dockets, plus another (No. 19,218), everything required is covered in 320 printed pages. This is a practice the Court encourages.

See Amended Rules 24(a), 5 Circuit, effective as of June 1, 1962.

[2] These are the subject of our dockets 19113 and 19214, and 19114 and 19213 concerning Commission Docket Nos. C161-1283 and 1282, respectively.

[3] It now seems to be agreed that despite some ambiguous discrepancies, under the peculiar mechanics of certain adoptive contracts, the rates in the sales contract in Docket Nos. 19153, 19154, 19155, 19156 (covering Commission Dockets Nos. C-161-1343, 1344, 1345 and 1346) are 20¢ with a single 3¢ escalation at the end of ten years.

service immediately, alleging the existence of an emergency situation resulting from "the necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than" the pipeline Purchaser.[4]

It is helpful to digress here to point out two things. First, while the initial price, 20¢ Mcf was the same as the currently effective permanent certificate covering gas from the same field to the same pipeline Purchaser, the escalation provisions were markedly different, and on a total weighted average the price was greater. Second, and of more importance, between the date of the issuance of the permanent certificate covering the sale of gas from this same field to the same pipeline Purchaser, the Commission issued its Statement of General Policy No. 61-1, 18 CFR § 2.56, 24 FPC 818. In this Statement it established area price standards to be used as guides in determining where the proposed initial rates should be certificated without a price condition. The "initial service rate" established for Texas Railroad District No. 3 was 18¢ Mcf. Of course the application of February 27, 1961, was for a new certificate and was a transaction expressly envisaged by 61-1. No reference in the application was made by the Purchaser to Statement 61-1 and, oddly enough, none was made in these terms by the Commission until long after the petition for review machinery had been set in motion by the Producer.

327 Presumably in the usual form and without the statement of any reasons, the Commission by letter order of April 7, 1961,[5] issued the temporary authority to sell the gas as proposed in that docket, but "subject to the following conditions" which for ease of reference we identify in brackets [1], [2] and [3]:

[1] That the total initial price not exceed 18 cents per Mcf at 14.65 psia;

[2] that there be filed within 20 days a supplement to the rate schedule consistent with [1] above and a revised billing statement;

[3] that the temporary authorization be accepted in writing by a responsible official of the company.

[4] This is a prerequisite to the invocation of the temporary-authorization provisions of § 7(c) and Natural Gas Regulations § 157.28(c), 18 CFR § 157.28(c).

[5] This Order of April 7 is the first Order under review in this proceeding. See note 8, infra.

On May 5, 1961, the Producer filed its acceptance of this temporary authority but without prejudice to a claimed right to seek removal of conditions [1], [2] and [3] and to seek an increased rate in accordance with terms of the amended rate schedule filed contemporaneously. Filed presumably in compliance with Condition [2] was a contract amendment stating that the initial price would be 18¢ Mcf for the first thirty (30) days following commencement of deliveries and thereafter 20¢. Deliveries had, in the meantime, commenced under the temporary authorization on April 19, 1961. Contemporaneously with the filing of its acceptance, the Producer also for-
328 mally sought rehearing of the Order of April 7 imposing conditions [1], [2] and [3].

Again we digress to point out that the Commission did more than deny the petition for rehearing. It changed its Order of April 7 substantially. This action forms an additional complaint of the Producer here. That action was taken on May 31, 1961. That Order (a) denied the application for rehearing, and (b) rejected the amended rate schedule on the ground it appeared to authorize an increase from the 18¢ rate during the continuance of temporary authorization. Then, to remove doubt it (c) expressly modified the language of the authorization to provide explicitly that no change from the 18¢ rate could be made during its term.[6] And finally, because of (b) and (c), the Order (d) rejected a proposed filing of a 20¢ rate made in accordance with the amended contract.[7]

The Producer filed a timely application for rehearing of the Order of May 31 and shortly thereafter formally retendered its acceptance of the temporary authorization and also the increased-rate filing to 20¢. On July 26, 1961, the Com-
329 mission denied the application for rehearing and rejected the retendered increased-rate filing.[8] Timely petitions to review the Commission Order issuing temporary

[6] The letter Order of May 31 prescribed that condition [1] of the letter Order of April 7, 1961, was "modified to read as follows:

"[1] that the total initial price under this authorization shall not exceed 18¢ per Mcf * * *, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

[7] The notice of proposed change in the rates was filed on May 12, 1961, to be effective on May 19, 1961 in accordance with the terms of the amended contract. Deliveries had commenced 30 days earlier on April 19, 1961. No question has been raised about the sufficiency of that notice or its operative effect generally under § 4(e).

[8] The Order of May 31 including the action on July 26 is the subject of the second petition to review filed in this Court. See note 5, supra.

Thus we see how the paper mill burden may increase by operation of the mandatory rehearing prerequisite of § 19(b).

authorization subject to conditions and the Commission Order rejecting the Producer's purported acceptance, its filing of an amended rate schedule, and its filing of increased rates were thereafter filed.

While that ordinarily would be the cutoff date, the record as certified shows that subsequent action was taken by the Commission. On November 2, 1961, the Commission sent the Producer a Letter Order which amplified its previous orders and modified them on one respect. This letter undertook to state reasons for the prior action generally in terms that the imposition of the 18¢ price condition was taken in keeping with policy Statement No. 61–1. It further stated that upon reconsideration, the Commission had determined that it should permit the filing of the contract amendment which it had rejected earlier. This was, the Commission explained, merely to afford a contract basis for the collection of the authorized 18¢ rate. It was made clear, however, that this was "for the express purpose of permitting there to be on file the contractual agreement between you and [the pipeline Purchaser] under which you will be receiving 18¢ per Mcf." And it sounded the warning that "this should not be construed as permission for you to file for an increased rate pursuant to section 4(d) of the * * * Act during the pendency of the temporary authorization." The Commission thus made plain that in the
330 new condition of the Order of May 31, 1961,[9] it was speaking precisely in terms of the use of the statutory right to file rate increases under § 4(d) of the Act.[10]

The Producer asserts three principal complaints, the first two of which we think have no merit.

There is, first, the contention that after the grant of temporary authorization by the Order of April 7, 1961, imposing its Conditions [1], [2] and [3], the Commission could not make these conditions more onerous by its Order of May 31. It emphasizes two things, one of which is that condition [1]

---

[9] See note 6, supra.

[10] The Commission's letter of November 2, 1961, continued: "The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See e.g., *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases. * * *."

spoke previously in terms of the "*initial price*" not exceeding 18¢, the other being that it commenced deliveries on April 19, 1961. The suggestion seems to be that this is too much the changing of the rules in the middle of the game. There is nothing to this. The Producer sought a change in the rules. The Producer was unhappy with the Order of April 7 and—by its conditional acceptance with express reservation of rights and its simultaneous application for rehearing—sought to obtain a new ruling by the Commission. If anything as fresh as the Order of April 7, 1961, had to have anything to keep it alive as a matter within the continued reconsideration of the Commis-
231 sion at least during the 60-day period allowed for appeal to the Court of Appeals, the application for rehearing was more than enough. The petition for rehearing is not a one-way street. It seeks a reconsideration. A reconsideration carries with it the imminent prospect that things will be worse, not better, after rehearing.

Somewhat akin to this criticism is the further procedural one that the Letter Order of November 2, 1961, is of no consequence in this record. The Commission asserts that since this occurred prior to its certification of the record, the Commission continued to have jurisdiction. § 19(b), 15 USCA § 717r(b). But we do not have to decide this specifically. The reasons asserted, perhaps retrospectively, in support of its May 31 modification is but a forecast of the rationale elucidated by the General Counsel to sustain the Order. In any case, it is the Order that is in issue. What the Commission says, as with the Court's opinion, is of great importance and its intrinsic weight is not affected by the time of its deliverance when, as was the case here, it is on a temporary certificate, as to which no formal record is or can be made. So far as the modification which allows the filing of the amended contract, previously rejected by the Commission, is concerned we regard that as an accomplished fact. It merely spells out what is otherwise so plain in the Commission's actions that it was permitting the sale under a contractual arrangement, but on the express positive condition that no increases in the rate would be allowed whether in, or not in, the contract.

The second complaint is more substantial. In effect it is that there was no reasonable basis for requiring a price reduction from 20¢ to 18¢. If the Producer were to establish
232 this contention, it is not likely that, at this juncture, we would even reach the problem of the prohibition of § 4(d) increases.

Both as to the specific reduction in the initial sales price and in the related problem of requiring a price reduction—as distinguished from collection of the contract price under an obligation to refund the difference—great reliance is placed upon the decisions of the 10th and 7th Circuits in the cases reversing the BTU adjustment condition. *The Pure Oil Co.* v. *FPC*, 7 Cir., 1961, 292 F. 2d 350; *Sohio Petroleum Co.* v. *FPC*, 10 Cir., 1961, 298 F. 2d 465; *Eason Oil Co.* v. *FPC*, 10 Cir., 1961, 298 F. 2d 468; and see also from the 3rd Circuit, *J. M. Huber Corp.* v. *FPC*, 3 Cir., 1961, 294 F. 2d 568. For our present purposes, we can accept the standards elucidated in those opinions, but they do not compel any reversal here.

It is important to bear in mind a factor we discuss in greater detail later on. We are here dealing with temporary authorization. There is, and can be, no formalized record in the traditional sense. What tools are we to use, then, by which to construct a thesis showing that it was completely arbitrary for the Commission to have required an effective reduction in price? The Producer emphasizes the previous permanent certification of a 20¢ rate in the related sale. But aside from whatever uncertainty is now cast upon that decision,[11] we
333 think a good deal of water has gone over the dam which at least warranted the Commission taking an individualized look. One, of course, is the policy Statement 61-1 with its area pricing approach whose fetal development ought not to be imperiled by pre-natal traumas inflicted by restraints or restrictions from the judiciary. Equally important is the declaration from this and other Courts concerning the nature of the evidence required on the hold-the-line policy of CATCO.[12] In

---

[11] There is some suggestion that this might be affected by the action of the Court of Appeals in *Public Service Commission* v. *FPC*, D.C. Cir., 1961, 295 F. 2d 140, cert. denied, December 18, 1961, 368 U.S. 948, 82 S. Ct. 388, 7 L. Ed. 2d 343, reversing the Commission's refusal to allow the New York Public Service Commission to intervene.

[12] *United Gas Improvement Co.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 133, cert. denied sub nom, *Sun Oil Co.* v. *United Gas Improvement Co.*, 1961, 368 U.S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27; *United Gas Improvement Co.* v. *FPC*, 9 Cir., 1960, 283, F. 2d 817, cert. denied sub nom, *Superior Oil Co.* v. *United Gas Improvement Co.*, 1961, 365 U.S. 879, 81 S. Ct. 1060, 6 L. Ed. 2d 191, and *California Co.* v. *United Gas Improvement Co.*, 1961, 365 U.S. 881, 81 S. Ct. 1060, 6 L. Ed. 2d 192; *United Gas Improvement Co.* v. *FPC*, 10 Cir., 1961, 287 F. 2d 159; *Public Service Commission of New York* v. *FPC*, D.C. Cir., 1960, 287 F. 2d 146, cert. denied, sub nom., *Hope Natural Gas Co.* v. *Public Service Commission of New York*, 1961, 365 U.S. 880, 81 S. Ct. 1031, 6 L. Ed. 2d 192, and *Shell Oil Co.* v. *Public Service Commission of New York*, 1961, 365 U.S. 882, 81 S. Ct. 1030, 6 L. Ed. 2d 192.

addition to these intervening events of considerable administrative-legal significance, the rates in all but the Chanango Field (see note 3, supra) carry ultimate rates considerably in excess of 20¢ Mcf. We are asked on this skimpy record, unaided either by traditional evidence or that of expert economists, to say as a matter of law that a contract with four built-in 2¢ escalations does not have an inflationary or triggering effect. On the assumption that the collection of the increases is ultimately allowed, it is quite plain that over the life of the contract the price for all gas delivered was 20¢ plus. We would assume that what is so inescapable as a matter of economics would be understood in the same way by practical men in the business of selling and buying natural gas.

Nor do we find any basis for attacking the Commis-
334 sion's choice between a reduction in the initial price, rather than an order permitting collection of the contract rates subject to refund. There are a whole host of problems, legal and administrative, wrapped up in this choice. In the Commission's limited facility for study of the probable ultimate merits of a sale when considering an application for temporary authority, the circumstances would, we think, have to be quite unusual to warrant a Court differing with this conclusion inevitably called for the nicest of expert judgments.

But we view the express prohibitions of § 4 increases as beyond the pale of administrative discretion. We do not think that under the guise of a condition of a temporary authorization, the Commission can forbid what Congress has expressly allowed to a natural gas producer. We reach this conclusion by application of the principles discussed and followed in *Texaco, Inc.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 149, and *American Liberty Oil Co.* v. *FPC*, 5 Cir., 1962, 301 F. 2d 15. We do not, however, regard, as do the parties in various aspects, that either or both of these decisions is directly and positively controlling. As is perfectly plain, there is and must be a difference between a permanent certificate and a temporary authorization. Consequently, what is said in *Texaco* with regard to action permissible for a permanent certificate does not necessarily apply for a temporary.[12] On the other hand, the opposite is not necessarily true.

[12] Along with shorthand references to § 4 and § 5 proceedings, etc., the words "temporary" or "temporaries" seem destined to become part of the jargon too.

These cases start with the recognition that conditions
335 may be imposed. And, of course, the factor deemed to be of such importance in *CATCO* was the beginning price. Thus, the Supreme Court held, the Commission, without making a rate case out of it, had the duty to take into account price as that might bear specifically, generally, immediately or remotely, on the public interest. In *Texaco* we did, of course, state that "The power of the Commission to condition a certificate is co-extensive with its power to reject or deny a certificate * * * because the power to reject an application for certificate completely is harsher than the power to grant it on any reasonable condition," 290 F. 2d 149, 156. But we did not intend this to declare that since the Commission had it within its actual power not to grant an application, it could therefore impose *any* conditions that, no matter how harsh in fact, were somewhat less than a complete refusal. We had earlier expressed it in terms such as these: "* * * it can hardly be argued that the Commission would not have had the power, *if it made a soundly based finding* that the public convenience and necessity did not warrant its granting of a certificate at an initial price higher than 17.7 cents, to deny the certificate out of hand." 290 F. 2d 149, 155 (emphasis added).

The idea of reasonableness was therefore implicit in equating outright denial and grant subject to conditions. We spelled it out plainly in *American Liberty* where, of the grant of a temporary we declared, "This is not to say that the Commission can act arbitrarily, whimsically or in a manner that amounts to a clear abuse of its discretion." 301 F. 2d 15, 18. Elaborating on this we then adopted as our own the standards suggested by the Commission. "The reasonableness of the Commission's determination must be viewed in light of the summary and
336 ex parte nature of a grant of such temporary authorization * * *" and "* * * the Commission's action * * * can be set aside only if the Court were to determine that the order issuing a conditioned certificate was a clear abuse of discretion, i.e., arbitrary, whimsical, or capricious action, or that the order was otherwise as a matter of law erroneous on its face." 301 F. 2d 15, 18.

This envisages, of course, that there is a line past which the Commission may not go. The line is different for a permanent, rather than a temporary. The line may be a fuzzy one and difficult to locate. But somewhere there is a mark.

Up to now the line has not been permitted to go so far as to obliterate specific sections of the Natural Gas Act by requiring that one seeking to make an interstate sale must agree to forego and relinquish for an indefinite period of time safeguards and rights which Congress has established. On the contrary, what was done in *Cetco* and by us in *Texaco* demonstrates that the necessity for conditioning a grant of a certificate is to fulfill the aims of the Act by an accommodation of all of its demands. Thus, the Court in *Cetco* had this to say. "In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." 360 U.S. 378 at 391. In a very practical way we made just such an accommodation in *Texaco*. Thus, by rejecting a highly legalistic impediment supposedly founded on *Mobile*,[14] we categorically stated that
337 the price condition in the certificate would not prohibit the producer from filing, as soon as the sales contract otherwise permitted, a rate increase under § 4 which would thereafter be subject to suspension and collection under the obligation of reimbursement. This was a recognition that while, as a condition to a grant, the Commission would require the parties to commence the sale at a price lower than that fixed in the contract, the contract thereafter did not cease to have vitality. The so-called "revision of the contract obligation" resulting from condition imposed by the Commission does not, we said, "amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to." 290 F. 2d 149, 156.

Without even remotely implying that a permanent and a temporary are to be treated always alike, we can see no distinction in this area when viewed either as a matter of statutory power in the Commission or statutory rights accorded to a natural gas producer, or both. If, as we held may legally be done,

[14] United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

the producer may increase rates and thereafter collect them subject to suspension and refund under § 4, it is obvious that the *Catco* price "line" sought to be maintained by the condition is not the one currently being observed after the permissible § 4 increase. From the standpoint of the payments the purchaser is required to make, the actual price is in fact above the "line." Of course that makes maintenance of price line something less than completely effective. But that is the unavoidable consequence of a unique statutory regulatory scheme in which, as *Mobile* (see note 14, supra) points out, rates are initially
338 prescribed (and increased) by private contract. Not everything is lost, however, since, as *Catco* contemplated, any contract increases are collected subject to refund. Additionally, this puts the burden of establishing lawfulness of the rates on the producer. Also it eliminates the prospect of irretrievable excess payments even though, in a lumbering and prolonged § 5 rate investigations, the initial price is found to be too high. Viewed in this light we see no real distinction between a permanent and a temporary. Both in terms of the effectiveness and in terms of economic impact, the collection of a post-condition § 4 increase is the same for a temporary as for a permanent.

To allow this prohibition of § 4 condition, we would be as much as saying that in determining whether the addition of the proffered gas to the interstate market serves the public interest the rates to be prescribed are not those fixed under the sales contract by the parties. Rather the rates are those (a) fixed by the Commission in the first place and which are to continue until (b) the Commission itself fixes another level. This is a complete abandonment of the approach deliberately selected by Congress and which, all must agree, was a radical break with traditional utility-type regulation.

The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to an administrative agency. There is, first, the status of the producer under a temporary. His rights may be temporary, but his duties are not, or at least on the present holding they are not. Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with
339 the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under § 7(b),

15 USCA § 717f(b). *Sun Oil Co.* v. *FPC*, 1960, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed 2d 1639; *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed 2d 1623; *Continental Oil Co.* v. *FPC*, 5 Cir., 1960, 286 F. 2d 208. That means that, for good or evil, a producer under a temporary is subject to all of the regulations, restraints and duties of a natural gas company, § 2(6), 15 USCA § 717a(6). Nothing in § 4 or in § 7 outlining the grant of certificate, or anything elsewhere in the Act takes from such producer the rights as a natural gas company which the law accords as a part of the duties imposed. Such producer is required under § 4(a) as a "natural-gas company" to maintain "just and reasonable" rules, regulations and rates, is forbidden under § 4(b) to "make or grant any undue preference" in "rates, charges, services, facilities * * *" and under § 4(c) is obliged to maintain and "keep open * * * for public inspection" its "schedules showing all rates and charges for * * * sale * * *," and under § 4(d) to make no change, without Commission approval, except upon "thirty 'days' notice." Finally, the critical § 4(e) prescribes that such proposed rate shall be in effect. It first provides that whenever a new rate is filed by a natural gas company "the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate * * * and, pending hearing * * * may suspend the operation of such schedule and * * * rate, * * * but not for a longer period than five months * * *." But it then goes on to provide that "If the proceeding has not been concluded and an order made at the expiration of the suspension period * * *" then on motion of "the natural gas company" the "proposed * * * rate * * * shall go into effect * * *."

340 Moreover, this subjugation of such a producer under a temporary to the almost perpetual control of the Commission is more than an academic theoretical. It is a clear and present—and largely unavoidable—fact. It is no reflection on the Commission or its over-burdened and energetic staff to take practical cognisance of the great delay in processing these matters. On the contrary, one can have only a genuine respect for the manner in which all grapple with this monumental and increasingly unmanageable task as the result of fallout from *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035. But despite strenuous efforts and the

importation of resourceful, new plans and methods for coping with it, the fact is that progress is slow, so slow indeed that it is hardly progress."[14]

341 Even from our remote position, it seems safe to conclude that never will the Commission be able to process certificates on an individualized basis. The hopes for a practical solution must rest in generalized area-pricing or similar resourceful adaptations of law and life.[15] But assuming its legal

---

[14] In the report of the Commission, Opinion No. 338, in the *Phillips* case of September 1960, 24 FPC 537, demonstrating the absurdity of a traditional cost of service approach, the Commission described its plight in these words. "An illustration of the administrative impossibility of separate determinations for all producers' rates is found in the fact that there are 3,372 independent producers with rates on file with this Commission. The producers have on file with us 11,091 rate schedules and 33,231 supplements to these schedules. Currently, 970 of these producers are involved in 3,278 producer rate increase filings now under suspension and awaiting hearings and decisions. The number of completions of independent producer rate cases per man-year during the first 6 years following the Phillips decision indicate that nearly 13 years would be required for our present staff to dispose of the 2,313 cases pending on July 1, 1960. Within this 13-year period an additional estimated 6,500 cases would have been received.

"Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one-half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968—eight and two-tenths years from now. * * *." 24 FPC at ——.

The Commission, with whatever help it can marshal from Congress, perseveres in its determination to make some headway. Justifiably pointing to some improvement the Commission's outlook is very guarded. The Commission's first quarterly report (Release No. 11,991; G-6559) of May 1962 reflects that "* * * the Commission had made a small reduction in its backlog of independent producer gas certificate cases during the year * * *," reducing them from 3,122 to 3,026. But in the 3,026 producer certificate cases pending as of March 31, 1962, a total of 2,096 have been granted temporaries. Headway is being made. In the first quarter of calendar year 1962, a total of 606 certificate cases were disposed of in contrast to 217 in the previous quarter and 301 in the same quarter of 1961. However, the backlog will be a long time fixture for against 606 dispositions, there were 433 new filings. At today's pace the dispositions exceed new filings on an annual basis by a net of some 720 cases. Thus it will take 4½ years to eliminate the backlog of 3,026 cases.

In independent producer rate filings and actions, there were 2,845 filings under suspension aggregating $168,654,624. Many of these are involved in the two area rate proceedings, one of which is now in progress in Docket No. AR61-1, but the Commission concludes a "significant decrease in number of suspensions on hand is not anticipated pending conclusion of [the first area rate] hearing."

The Commission through its chairman is currently seeking a 31% increase in appropriations to obtain an adequate staff to eradicate this obstacle.

[15] The hopes and fears of all the years—for the natural gas business at any rate—is portrayed by Judge Prettyman with his characteristic brilliance in the opinion of the Court of Appeals sustaining the Commission's decision in the *Phillips* case. *State of Wisconsin* v. *FPC*, 16175; *Long Island Light-*

validity will be upheld broadly enough to make it effective, even this cannot be counted on for much immediate help. Speaking of this "new system" of area pricing and the time before it can be established, Judge Prettyman stated
343 (see note 16, supra), "This period will be long, estimates running from four to fourteen years."[37]

This is important for we have to view Commission action in terms of its broad and inescapable impact. It is no answer to the awesome implications thus revealed to suggest that as to these particular dockets, the Commission has, so we are informed, assigned them to a hearing which, perhaps by now has actually taken place. The problem presented in these hearings will be essentially the one presented in *Cateo* and if it, and the many other numerous cases coming to this Court from the Commission, are any guide, it is almost certain that we are dealing with orders which cannot become final for two or three years more.[38] Time is therefore important. Time is a part of the problem for adjudication. In view of the structure of the Natural Gas Act, this time is irreplaceable to the producer. This is so even though the decision of the Commission on the grant of the permanent or, perhaps even later, in a § 4 or § 5 determination of just and lawful rates approves the proposed initial contract rate (or at least one higher than the conditioned rate).

And finally, the condition is so awesome because—and
343 it is no more *reductio ad absurdum* to say—if the Commission may set aside § 4 and the rights, privileges and protections which it accords to a natural gas company subject

---

ing Co. v. *FPC*, 16177; *People of the State of California* v. *FPC*, 16180, D.C. Cir., 1961, — F. 2d —. With certiorari having been granted, — U.S. —, — S. Ct. —, 3 L. Ed. 2d 375 [30 L.W. 3253], the decision of the Supreme Court will be portentous.

"In setting the increased appropriations (note 15, supra), the chairman is reported as testifying that the present Permian Basin area rate proceeding would not be settled for a year or two. Moreover, until it and the South Louisiana proceeding are well along, the Commission would not likely initiate any others.

"Any specialized treatment of pending certification applications likewise tends to imperil either the utility, or the broad legality, of the area pricing system envisaged in 61-3. By its terms the rates specified in the appendix "are for the purpose of guidance and initial action by the Commission" for use by it "in the absence of compelling evidence calling for other action" in passing upon "proposed initial sales" and "• • • rate changes filed under existing contracts which call for a rate exceeding the indicated price level • • •."

to all of the obligations of the Act, then there is no end to the legislative tampering which the Commission may undertake. It may just as well deny the producer the right of review by rehearing or petition to the Courts under § 19(b).[*] Or it might just as well conclude that the producer's operations are uneconomic because of doubtful reserves or a current exploration program and condition the grant of a temporary on divestment of unprofitable leases or the cessation of wildcat drilling.[*]

The condition is erroneous on its face and the cause must be reversed and remanded for further consistent proceedings.[*]

344 Congress has subjected a temporary natural-gas producer to § 4 and all other parts of the Act. Congress has extended to all natural gas companies, permanent or temporary, the protection and rights of § 4 and the Act. Each is interlocked.

That which Congress has joined together, let not the Commission put asunder.

REVERSED AND REMANDED.

---

[*] As to this we are not here dealing with academic theoretical. For the Producer, pursuing essentially what the Commission has done with regard to the post-record letter of November 2, 1961, has brought to our attention a current temporary (Docket No. CI62-216 of October 6, 1961) in which to a condition [2] fixing the rates to "remain in effect until changed by Commission order" the Commission attaches another condition that the producer not seek any rehearing or review:

"(3) The temporary authorization with conditions attached shall be accepted as issued and without reservations for further review after commencement of service, within 30 days hereof by written acceptance * * *. If reconsideration of such temporary authorization is sought, service hereunder shall not be started. If service is commenced under this authorization, the conditions attached shall be effective and the service may not be discontinued without permission of the Commission * * *."

[*] So long as *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499, stands, § 1(b) denies power to do this.

[*] We do not undertake to blueprint the matters requiring reconsideration. But it is quite clear that as condition [1] as amended (notes 6, 8, 10) was illegal and void, the filing of the amended contract and the proposed rate increase were legal. The rate represented by the proposed increase became effective on its filing subject to a maximum of five months' suspension. But since it is a certainty that the Commission would have exercised the right of suspension, the collection thereafter must be deemed to have been under an order for refund.

345 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19065

H. L. HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued March 17, 1961 and May 11, 1961, in Docket No. CI61-1221, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

---

346 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19113

W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of W. H. Hunt, Trustee for Hassie Hunt Trust, for Review of Orders of the Federal Power Commission issued April 7, 1961, and May 31, 1961, in Docket No. CI61-1233, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

347 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19114

H. L. HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued April 7, 1961, and May 31, 1961, in Docket No. CI61-1232, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

348 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19153

CAROLINE HUNT SANDS, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of Caroline Hunt Sands for Review of Orders of the Federal Power Commission issued April 25, 1961, June 16, 1961 and July 26, 1961, in Docket No. CI61-1343, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

349 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19154

J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of J. A. Goodson, Trustee for Caroline Hunt Trust Estate, for Review of Orders of the Federal Power Commission issued April 25, 1961, June 16, 1961, and July 26, 1961, in Docket No. CI61-1344, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

350 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19155

A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of A. G. Hill, Trustee for Lamar Hunt Trust Estate, for Review of Orders of the Federal Power Commission issued April 25, 1961, June 16, 1961, and July 26, 1961, in Docket No. CI61-1345, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

351 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19156

NELSON BUNKER HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of Nelson Bunker Hunt for Review of Orders of the Federal Power Commission issued April 25, 1961, June 16, 1961 and July 26, 1961, in Docket No. CI61-1346, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

352 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19212

H. L. HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued on May 31, 1961 and July 26, 1961, in Docket No. CI61-1221, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

353 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19213

H. L. HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1962

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued on May 31, 1961 and July 26, 1961, in Docket No. CI61-1282, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

354 In the United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19214

W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Orders of the Federal Power Commission

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT—JULY 19, 1963

This cause came on to be heard on the petition of W. H. Hunt, Trustee for Hassie Hunt Trust, for Review of Orders of the Federal Power Commission issued May 31, 1961 and July 26, 1961, in Docket No. CI61-1283, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

355 In the United States Court of Appeals for the Fifth Circuit

[File endorsement omitted.]

Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19156, 19212, 19213, 19214

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; NELSON BUNKER HUNT, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petitions to Review and Set Aside Orders of the Federal Power Commission

ORDER DENYING PETITION FOR REHEARING—APRIL 16, 1963

Before BROWN, WISDOM, and BELL, Circuit Judges.

BROWN, Circuit Judge:

It is ORDERED that the Petition for Rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

No. 273, October Term, 1963

FEDERAL POWER COMMISSION, PETITIONER

v.

H. L. HUNT, ET AL.

ORDER ALLOWING CERTIORARI—OCTOBER 14, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

CITATIONS

Cases:

693-748—63——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, entered on July 19, 1962.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A., *infra*, pp. 17–38) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's order and remanding the proceedings were entered on July 19, 1962 (App. B, *infra*,

pp. 39–40). A timely petition for rehearing was denied on April 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer applying for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act also requests, on emergency grounds, the grant of temporary operating authority, may the Commission condition temporary authorization upon the applicant's maintaining (*i.e.*, not increasing) a prescribed initial price pending final disposition of the application?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7 (b), (c), and (e), 52 Stat. 821, as amended, 15 U.S.C. 717–717w) are set out in Appendix C, *infra*, pp. 41–47.

STATEMENT

These cases involve temporary authorizations of sales of natural gas issued to independent producers by the Federal Power Commission under Section 7(c) of the Natural Gas Act. The relevant facts are as follows:

In February, 1961, the producer respondents applied to the Commission for certificates of public convenience and necessity covering sales of additional gas from a field where some gas was already being sold under F.P.C. certificates previously issued. The additional sales were covered by 20-year contracts calling

for initial prices of 20¢ per Mcf with specified escalations. While the initial 20¢ per Mcf price was the same as that for the previously certificated sales, the escalations provided in the new contracts brought their weighted-average prices above those in the earlier contracts.

Alleging the existence of emergency conditions cognizable under the Commission's Natural Gas Regulations,[1] respondents requested temporary operating authority pending determination of their certificate applications. The Commission granted the temporary authorizations subject to the conditions that (1) the total initial price not exceed 18¢ per Mcf; (2) within 20 days, supplemental rate schedules and revised billing statements be filed consistent with the 18¢ per Mcf price condition; and (3) the temporary authorizations be accepted in writing.

Respondents commenced deliveries, submitted acceptances purporting to reserve the right to seek removal of the conditions, and filed contract amendments calling for an initial price of 18¢ per Mcf for the first thirty days' deliveries and 20¢ per Mcf thereafter. At the same time, respondents applied for rehearing of the order imposing the conditions.

The Commission denied rehearing. It also (1) rejected the amended rate schedules because they

[1] Section 7(c) (*infra*, pp. 44–45) authorizes the issuance of temporary authority "in cases of emergency." Implementing that Section, the Commission has promulgated rules (18 C.F.R. § 157.28(c)) which recognize that various types of threatened physical or economic loss (drainage of gas, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties) may constitute an emergency.

called for increases above 18¢ per Mcf during the period of the temporary authorizations, and (2) amended those authorizations so as to provide expressly that no change could be made in the 18¢ rate for the duration of the "temporaries." The Commission also rejected increases to 20¢ which respondents had tendered for filing under the revised contracts. The Commission later denied renewed applications for rehearing and again rejected the tendered rate increases.

Finally, the Commission issued a letter-order (1) permitting the revised contracts to be filed, but solely to provide a contractual basis for the collection of the 18¢ rate; (2) explaining its prior action by reference to Statement of General Policy No. 61-1 (§ 2.56, 18 C.F.R. 2.56); and (3) stating specifically that acceptance of the revised schedules for filing "should not be construed as permission * * * to file for an increased rate pursuant to section 4(d) of the * * * Act during the pendency of the temporary authorization."

The court below held that the Commission had the power, on an application for rehearing, to specify more stringent requirements or conditions than those made explicit in its original order. It further sustained the Commission's power to condition a temporary authorization on a reduction of the initial rate, rejecting the producers' contention that the Commission's authority to protect consumer interests was limited to allowing collection of the contract price subject to refund.

But the court below held further that the Commission could not lawfully condition temporary authorizations so as to prohibit for their duration the filing of rate increases under Section 4(d). While disclaiming an intention to direct the Commission's action on remand, the court below indicated (App. A, *infra*, p. 38, n. 21) that, regardless of what action the Commission might take on the applications for permanent certificates,[2] "[t]he rate represented by the proposed increase became effective on its filing subject to a maximum of five months' suspension," and, therefore, as of the end of such five months' period, respondents were entitled to collect 20¢ per Mcf subject to refund of such amount as exceeded the "just and reasonable rate" to be thereafter determined.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the decision of the Third Circuit in *Alabama-Tennessee Natural Gas*

[2] The cases were set for hearing on the applications for certificates of public convenience and necessity. On April 11, 1963 (after the decision of the court below, but four days before its denial of the Commission's petition for rehearing), the examiner rendered his decision granting permanent certificates at the initial in-line prices of 16¢ per Mcf in six of the seven dockets here involved (Cases Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19212, 19213 and 19214 below) and 15¢ in the seventh (Case No. 19156 below). The difference in initial price conditions prescribed by the examiner is explained by a difference in geographic area of the production covered.

Additionally, though not involved in the present litigation, the temporary authorization in Case No. 19156 contained a requirement of refunds in the event the initial price prescribed in the certificate was set at less than 18¢ per Mcf. The examiner has accordingly ordered refunds in that case.

Co. v. *Federal Power Commission*, 203 F. 2d 494. In addition, it determines important legal issues relating to the Commission's power to impose conditions in authorizing a producer to sell natural gas. Finally, it has far-reaching practical effects upon the Commission's ability to protect consumers from the collection of unreasonable charges—a matter of particular moment in the current phase of regulation.

1. In the *Alabama-Tennessee* case, *supra*, the Commission, after a hearing, granted a certificate of public convenience and necessity to a new pipeline. Concluding, however, that it lacked adequate experience to enable it to fix immediately a proper rate for the company, the Commission conditioned the certificate upon the pipeline's subsequent filing of a satisfactory tariff. Meanwhile, operations were allowed to go forward at a specified "interim" rate. No express condition against any increase in this interim rate was inserted in the certificate. Prior to the Commission's approval of a satisfactory tariff the company filed an increase in the interim rate. Upholding the Commission's authority to reject this filing, the Third Circuit, speaking through Judge Hastie, ruled as follows (203 F. 2d at 497):

> * * * To treat the "interim rate" permitted under the June 16, 1950 order [permitting operation at that rate] as the kind of rate which is subject to change on the free initiative of the Company under Section 4(d) is to ignore the restrictive context in which it was allowed to become effective. For it is our premise that the Commission had power to

> impose the rate condition * * *. Only after such an initial determination of a satisfactory rate in compliance with the June 16, 1950 order, could the Company properly claim that it was operating under the kind of tariff that is subject to change by Section 4(d) procedure.

If anything, the instant case is a stronger one from the Commission's standpoint. The producers here involved were granted temporary authority to make sales upon their *ex parte* representations that delay would cause them loss or hardship. Unlike the situation in *Alabama-Tennessee*, there had been no hearing on the certificate application and hence no showing by the applicants that the public convenience and necessity would be served by certification. Respondents, as noted in the Statement, *supra*, p. 4, were permitted to commence sales under temporary authority in a "restrictive context"—upon the explicit condition that they refrain from making any change in the price charged the pipelines during the period of interim authorization.

2. The opinion below adopts the view that under this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, and *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 ("*CATCO*"), once a sale of gas has been authorized, the only means by which the Commission can control price increases is provided by Section 4 of the Act—*i.e.*, the Commission may suspend the increase for a five-months' period, and thereafter the

sole protection to the consumer is the Commission's power to require that collection of the increased rate be made subject to refund. These cases do not imply, however, that the Commission's powers of certification under Section 7 of the Act would not permit it to impose, as a condition of granting a certificate, a requirement that the applicant accept reasonable and specified limitations upon the filing of rate changes.[3] In any event, whatever the scope of the Commission's power to establish limitations

[3] In the *Mobile* case, *supra*, 350 U.S. at 339, this Court emphasized that § 4(d) [the price increase provision of the Act] "is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract * * *." In *CATCO*, *supra*, it is true, the Court talked in terms of holding the price line through a certificate issued at the contract price but conditioned upon payment of refunds if a lower just and reasonable price was subsequently fixed. But nothing in *CATCO* suggests that such action would exhaust the Commission's power under Section 7(e) of the Act "to attach to the issuance of the certificate *and to the exercise of the rights granted thereunder* such reasonable terms and conditions as the public convenience and necessity may require," in circumstances where the Commission could properly conclude that collection of higher rates subject to refund would not adequately protect the consuming public. (Italics supplied.) The court below has itself approved Commission decisions setting initial in-line prices below those specified in the contracts and sought by the producers' applications, though this would mean that, for at least a five months' period, the contract rates could never be collected. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149; see also *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923; *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.).

And we believe it clear that the Commission might well conclude that the present or future public convenience and necessity

in connection with such filings by a natural gas company operating under a certificate of public convenience and necessity, we believe it plain that the Commission has very comprehensive powers when, in the exercise of its discretion, it authorizes a temporary or interim operation at the behest of an applicant who has not yet established any of the elements which would justify certification. Concretely, we urge that it may, at a minimum, insist that the producer-applicant sell at rates which will not disturb the existing price line pending final disposition of the application for a certificate.[4]

---

militate against any grant authorizing the collection of a rate in excess of the in-line rate, at least pending determination of the rate for sales of gas from a particular area. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where the court held that a Commission order entered in a certificate proceeding requiring a natural gas company to provide a specified type of service "could not be collaterally nullified through the filing of a rate schedule change." Section 4 of the Act, the court said, "is of no help to petitioner in its endeavor to so unilaterally destroy the order which had been arrived at after an adversary hearing and under which petitioner had been proceeding since its issuance. * * * What Section 4(d) provides is an alternative method of effecting changes otherwise permissible by virtue of the Act" (232 F. 2d at 473).

[4] See, also, the following cases, decided subsequent to *CATCO*, which relate to the Commission's obligation to establish an initial in-line price: *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commis-*

In refusing to draw a distinction between permanent certification and temporary authorization, the court of appeals relied heavily upon the proposition that in either case the producer is deemed to have dedicated his gas to interstate service and cannot cease operations without an authorization of abandonment under Section 7(b) (App. C, *infra*, p. 44). This analysis overlooks vital differences. Temporary authorizations are granted without notice or hearing, upon an *ex parte* showing by the producer that an emergency exists which would warrant the Commission in exercising its discretion on his behalf and authorizing the commencement of service before the statutory procedure for passing upon his application for a permanent certificate can be completed. Consumer interests have no opportunity, prior to the grant of such temporary authority, to be heard on the crucial issue of price. In these circumstances, the producer who has been authorized to commence operations—thus avoiding the adverse consequences to him of a delay in operations—surely has no right to complain because, pending final disposition of his application, the Commission does not permit him to collect more than the price which it has generally found consistent

---

sion of New York, 365 U.S. 880; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

with the public interest.[5] As the Fifth Circuit itself held in *American Liberty Oil Co.* v. *Federal Power Commission*, 301 F. 2d 15, 18—a decision approving the fixing of a price for a temporary authorization at a level below that established by the producer's contract—the Commission's exercise of discretion in granting temporary authorizations can be modified or set aside, if at all, only when the Commission's action is a clear abuse of discretion, *i.e.*, "arbitrary, whimsical, or capricious * * * or * * * otherwise as a matter of law erroneous on its face * * *."[6] And the *Alabama-Tennessee* decision, *supra*, attests that it is

[5] The necessity to secure Commission approval prior to any abandonment does not change the preliminary nature of the authorization. For the producer, before opting to commence service, will know the price at which the Commission is willing to permit operation. Throughout the period, of course, the producer, who has dedicated his gas to the interstate market in advance of the certification proceeding fixing the in-line price, risks a determination that the in-line price may turn out to be less than that fixed in the temporary authorization. But surely that possibility does not warrant the charging of a still higher rate during the earlier period. The applicant can always reject the temporary authorization offered and await decision on the certificate application before commencing operation.

[6] Other decisions raise doubt as to whether orders granting temporary authorizations are reviewable even to this extent. *J-T Transport Co.* v. *United States*, 191 F. Supp. 593, 600 (W.D. Mo., 3-judge); *M. P. & St. L. Express, Inc.* v. *United States*, 165 F. Supp. 677, 681 (W.D. Ky., 3-judge); cf. *Jay* v. *Boyd*, 351 U.S. 345, 351. But cf. *Schenley Distillers Corp.* v. *United States*, 50 F. Supp. 491, 496 (D. Del., 3-judge); *Pennsylvania R.R. Co.* v. *United States*, 13 Federal Carrier Cases, par. 81,256 (E.D. Pa., 3-judge); *Bowen Transports, Inc.* v. *United States*, 116 F. Supp. 115 (E.D. Ill., 3-judge); *Mercury Freight Lines Inc.* v. *United States*, S.D. Ala. Civil No. 1609 (3-judge), decided April 27, 1956.

anything but arbitrary to require that conditions which the Commission may assuredly prescribe at the outset shall be preserved while the application of the natural gas company is awaiting its final disposition by the Commission.

3. The conclusion that the Commission has acted reasonably is fortified by a consideration of the practical consequences which might follow if the Commission were to adopt any other course.

One starts, of course, from the proposition that the Commission's primary obligation is to protect the consumers of natural gas. *CATCO, supra; Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591. See also, *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145. The cornerstone of the regulatory scheme is a prohibition of interstate transmission and wholesale sale of gas until the company has demonstrated, in a full hearing at which consumers' interests may be represented, that the proposed transactions will serve the public convenience and necessity. And the prices at which sales will be made are a critical consideration in determining the public interest involved. *CATCO, supra.*

Inherent in the statutory procedure is an inevitable delay between the filing of an application for a certificate and the Commission's final action thereon. It is true that if a producer were granted temporary authority and permitted to file rate increases pending the completion of the certificate proceedings, such increases could be suspended for five months and an ultimate refund obligation imposed. But the task of determining just and reasonable rates in Section 4

producer proceedings has been the principal source of delay in the conduct of the Commission's business. Refunds, moreover, are far from a perfect or complete remedy. *Federal Power Commission* v. *Tennessee Gas Transmission Co., supra.*

As the Court is aware, the Commission aims to meet the major problems associated with the regulation of prices charged by independent producers by abandoning individual company cost-of-service pricing in favor of a multi-company area approach. *Wisconsin* v. *Federal Power Commission,* Nos. 72–4, Oct. Term, 1962, decided May 20, 1963. As the Court also knows, *ibid.,* the transition to the new pricing system creates numerous problems if gas prices are not to get out of hand during the interim period. Not the least of these is the treatment of rate increase filings covering permanently certificated sales.[1] This problem has been attacked by the Commission with considerable success to date through (1) the establishment for various producing areas of guideline prices which mark the point at which filed rate increases will be suspended and (2) the designation for immediate hearing and disposition of the limited number of those rate filings which, if allowed to go into effect subject to refund, would, through "triggering" or otherwise, result in a more general increase in the price level.

This effort to hold the line would be seriously im-

[1] Consideration is being given to the advisability, in appropriate cases, of conditioning the grant of permanent certificates on the maintenance, for a specified time, of the in-line initial price determined in the certificate hearing.

paired if the Commission were also compelled to establish promptly the justness and reasonableness of rates for the numerous sales temporarily authorized. In recent years, the Commission has been issuing temporary authorizations to producers at a rate of more than 1,500 annually. More than 2,000 producer applications for certificates are now pending. Considering the volume of applications involved, the decision below, if permitted to stand, might well require the Commission, in the interest of consumer protection, to deny requests for temporary authority involving the risk of any increase beyond the guideline prices fixed by the Commission as the appropriate interim levels.

This course, paradoxically, would probably have its most serious consequences for independent producers, *i.e.*, for persons of the very class to which these respondents belong (although consumers, too, have a vital interest in matters of supply). The physical and economic facts of gas production are such that administrative delay in the disposition of applications for certificate authority may cause considerable hardship. For gas which cannot be sold must often be flared, *i.e.*, permitted to escape from the well and burned off. In other cases, gas which is not sold will be drained off by adjacent wells from which sales are authorized. In still other cases, the producers, as lessees, will be contractually obligated to pay so-called "shut-in royalties" even though they cannot sell the gas. To take care of these various situations, the Commission, by appropriate regulation (see *supra*, p. 3), has prescribed the conditions which it will consider emergencies warranting the issuance of temporary authorizations.

Such temporary authority is granted under the express provisions of Section 7(c) and, as already noted, without notice or hearing, upon a producer's *ex parte* showing that he is faced with serious hardship. It is granted at a guideline price which the Commission believes is sufficiently low to protect consumers prior to the hearing, at which stage all interested parties will have opportunity to establish their positions as to the initial price at which the sale should be permanently certificated. Where, as here, a producer's contract permits him to file for a higher price, maintenance of this guideline price for the interim period (*i.e.*, until his certificate application is acted on) can be assured only if the rate-increase mechanism of Section 4(d) is not available to the producer operating under temporary authority. If the Commission cannot afford consumers this protection, while permitting producers to avoid the harsh consequences of delay, the only workable alternative, in many cases, will be to deny the temporary authorization altogether.[8]

The Commission's practice, in short, has been one designed to give adequate protection to both producer and consumer interests—to allow the producers to

[8] In some cases, where the sales volumes are low and the higher prices authorized by the contracts are at or below other prices already being generally collected in the area, it might be feasible to rely upon the refund condition which could accompany any increased rate a producer put into effect subsequent to the statutory five months' suspension period. But see *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, *supra*. However, this limited remedy clearly would not suffice where, as here, the contract price was at a level which could lead to considerable triggering of existing contracts and thus threaten the entire area price line.

make sales under temporary authorizations when faced with emergencies; to afford consumers reasonable assurance that the price of any sale temporarily authorized is in line and will not be radically changed pending a full hearing and determination of the certificate application. This approach, we submit, is not only immune to a charge of arbitrariness; it is also, and more importantly, calculated to serve the public interest in the continuing production and sale of gas upon reasonable conditions.

CONCLUSION

The decision below is in conflict with the decision of another circuit and raises issues of very substantial public importance. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
ROBERT L. RUSSELL,
Assistant General Counsel,
JOSEPHINE H. KLEIN,
Attorney,
Federal Power Commission.

JULY 1963.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19156, 19212, 19213, 19214

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUSTEE; CAROLINE HUNT SANDS; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; NELSON BUNKER HUNT, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

(July 19, 1962)

Before BROWN, WISDOM and BELL, Circuit Judges.

BROWN, Circuit Judge: These cases raise the common question of whether the Federal Power Commission in granting a temporary certificate for the sale of natural gas at a specified initial sales price may lawfully prescribe as a condition that such price may not be increased without express approval of the Commis-

sion. The effect of such a condition is to deny to the producer the opportunity of filing a § 4(d)(e) subsequent rate increase. We hold that the Commission may not thus effectually condition-out a statutory right which Congress has prescribed. We therefore sustain the attack of the Producers who petition for review and reverse the Orders of the Commission.

While this question is almost submerged in the seemingly unavoidable flood of papers which consumes another natural resource while adjudicating this one, each of these ten separate petitions for review and the underlying orders, petitions for rehearing, orders on rehearing, and post-certification orders present substantially the same facts. Fortunately, what we can readily identify as the natural gas Bar, shows a commendable cooperation in streamlining into a single consolidated record and consolidated briefs and argument all of the essential materials—but no more—without costly repetition or duplication.[1]

While, as we stated, these involve many different dockets concerning rates or sales in the Alvin, Alta Loma and Chenango Fields within the Texas Railroad District No. 3, for all practical purposes the cases are

[1] The procedure worked out by trial and error and a good deal of give and take by the Solicitor of the Commission, counsel representing various parties and intervenors, and our Clerk over the past five years in the handing of these complicated records in natural gas cases is the source for our recently adopted rule prescribing a like optional procedure for general cases. The essence of it is that briefs are exchanged before the record is printed so that counsel, in thereafter jointly designating the printed record, know exactly what is, and is not, presented. Thus, in this case covering these ten dockets, plus another (No. 19,218), everything required is covered in 320 printed pages. This is a practice the Court encourages.

See Amended Rules 24(a), 5 Circuit, effective as of June 1, 1962.

the same and present this one basic question. Moreover, very little factual detail even as to a typical case is needed. Some dates and times are, however, important in showing the sequence and to pinpoint the complaints of the Producer. A brief synopsis of the Alta Loma proceedings will suffice.[2]

On July 1, 1960, the Commission issued a permanent certificate under § 7(e) to the Producer for the sale of gas to the pipeline purchaser. The rate prescribed was 20¢ Mcf. The 20-year contract as originally proposed called for an initial price of 20¢ with four escalations of 2¢ each every four years. In granting the permanent certificate, the Commission required that this be altered by prescribing a single 3¢ escalation at the end of the first ten years. This was accepted and service commenced. That Order, as such, is not under review in these cases.

Thereafter new production was brought in on this pooled gas unit. On December 15, 1960, the Producer entered into individual gas sales contracts with the Pipeline purchaser for the sale of this additional gas. The price fixed was 20¢ Mcf, but with four 2¢ escalations.[3] Thereafter on February 27, 1961, the Producer applied to the Commission for a Certificate of Public Convenience and Necessity to make these sales. It sought also temporary authorization to begin service immediately, alleging the existence of an emergency situation resulting from "the necessity of pay-

[2] These are the subject of our dockets 19113 and 19214, and 19114 and 19213 concerning Commission Docket Nos. CI61-1283 and 1282, respectively.

[3] It now seems to be agreed that, despite some ambiguous discrepancies, under the peculiar mechanics of certain adoptive contracts, the rates in the sales contract in Docket Nos. 19153, 19154, 19155, 19156 (covering Commission Dockets Nos. C-161-1343, 1344, 1345 and 1346) are 20¢ with a single 3¢ escalation at the end of ten years.

ing shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than" the pipeline Purchaser.[4]

It is helpful to digress here to point out two things. First, while the initial price, 20¢ Mcf was the same as the currently effective permanent certificate covering gas from the same field to the same pipeline Purchaser, the escalation provisions were markedly different, and on a total weighted average the price was greater. Second, and of more importance, between the date of the issuance of the permanent certificate covering the sale of gas from this same field to the same pipeline Purchaser, the Commission issued its Statement of General Policy No. 61-1, 18 CFR § 2.56, 24 FPC 818. In this Statement it established area price standards to be used as guides in determining where the proposed initial rates should be certificated without a price condition. The "initial service rate" established for Texas Railroad District No. 3 was 18¢ Mcf. Of course the application of February 27, 1961, was for a new certificate and was a transaction expressly evisaged by 61-1. No reference in the application was made by the Purchaser to Statement 61-1 and, oddly enough, none was made in these terms by the Commission until long after the petition for review machinery had been set in motion by the Producer.

Presumably in the usual form and without the statement of any reasons, the Commission by letter order of April 7, 1961,[5] issued the temporary authority to sell the gas as proposed in that docket, but "subject to

[4] This is a prerequisite to the invocation of the temporary-authorization provisions of § 7(c) and Natural Gas Regulations § 157.28(c), 18 CFR § 157.28(c).

[5] This Order of April 7 is the first Order under review in this proceeding. See note 8, infra.

the following conditions," which for ease of reference we identify in brackets [1], [2] and [3]:

> [1] That the total initial price not exceed 18 cents per Mcf. at 14.65 psia;
>
> [2] that there be filed within 20 days a supplement to the rate schedule consistent with [1] above and a revised billing statement;
>
> [3] that the temporary authorization be accepted in writing by a responsible official of the company.

On May 5, 1961, the Producer filed its acceptance of this temporary authority but without prejudice to a claimed right to seek removal of conditions [1], [2] and [3] and to seek an increased rate in accordance with terms of the amended rate schedule filed contemporaneously. Filed presumably in compliance with Condition [2] was a contract amendment stating that the initial price would be 18¢ Mcf for the first thirty (30) days following commencement of deliveries and thereafter 20¢. Deliveries had, in the meantime, commenced under the temporary authorization on April 19, 1961. Contemporaneously with the filing of its acceptance, the Producer also formally sought rehearing of the Order of April 7 imposing conditions [1], [2] and [3].

Again we digress to point out that the Commission did more than deny the petition for rehearing. It changed its Order of April 7 substantially. This action forms an additional complaint of the Producer here. That action was taken on May 31, 1961. That Order (a) denied the application for rehearing, and (b) rejected the amended rate schedule on the ground it appeared to authorize an increase from the 18¢ rate during the continuance of temporary authorization. Then, to remove doubt it (c) expressly modified the language of the authorization to provide explicitly that

no change from the 18¢ rate could be made during its term.[6] And finally, because of (b) and (c), the Order (d) rejected a proposed filing of a 20¢ rate made in accordance with the amended contract.[7]

The Producer filed a timely application for rehearing of the Order of May 31 and shortly thereafter formally retendered its acceptance of the temporary authorization and also the increased-rate filing to 20¢. On July 26, 1961, the Commission denied the application for rehearing and rejected the retendered increased-rate filing.[8] Timely petitions to review the Commission Order issuing temporary authorization subject to conditions and the Commission Order rejecting the Producer's purported acceptance, its filing of an amended rate schedule, and its filing of increased rates were thereafter filed.

While that ordinarily would be the cutoff date, the record as certified shows that subsequent action was taken by the Commission. On November 2, 1961, the Commission sent the Producer a Letter Order which

---

[6] The letter Order of May 31 prescribed that condition [1] of the letter Order of April 7, 1961, was "modified to read as follows:

"[1] that the total initial price under this authorization shall not exceed 18¢ per Mcf * * *, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

[7] The notice of proposed change in the rates was filed on May 12, 1961, to be effective on May 19, 1961 in accordance with the terms of the amended contract. Deliveries had commenced 30 days earlier on April 19, 1961. No question has been raised about the sufficiency of that notice or its operative effect generally under § 4(e).

[8] The Order of May 31 including the action on July 26 is the subject of the second petition to review filed in this Court. See note 5, supra.

Thus we see how the paper mill burden may increase by operation of the mandatory rehearing prerequisite of § 19(b).

amplified its previous orders and modified them on one respect. This letter undertook to state reasons for the prior action generally in terms that the imposition of the 18¢ price condition was taken in keeping with policy Statement No. 61-1. It further stated that upon reconsideration, the Commission had determined that it should permit the filing of the contract amendment which it had rejected earlier. This was, the Commission explained, merely to afford a contract basis for the collection of the authorized 18¢ rate. It was made clear, however, that this was "for the express purpose of permitting there to be on file the contractual agreement between you and [the pipeline Purchaser] under which you will be receiving 18¢ per Mcf." And it sounded the warning that "this should not be construed as permission for you to file for an increased rate pursuant to section 4(d) of the * * * Act during the pendency of the temporary authorization." The Commission thus made plain that in the new condition of the Order of May 31, 1961,[9] it was speaking precisely in terms of the use of the statutory right to file rate increases under § 4(d) of the Act.[10]

The Producer asserts three principal complaints, the first two of which we think have no merit.

---

[9] See note 6, supra.

[10] The Commission's letter of November 2, 1961, continued: "The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases. * * *."

There is, first, the contention that after the grant of temporary authorization by the Order of April 7, 1961, imposing its Conditions [1], [2] and [3], the Commission could not make these conditions more onerous by its Order of May 31. It emphasizes two things, one of which is that condition [1] spoke precisely in terms of the *"initial price"* not exceeding 18¢, the other being that it commenced deliveries on April 19, 1961. The suggestion seems to be that this is too much the changing of the rules in the middle of the game. There is nothing to this. The Producer sought a change in the rules. The Producer was unhappy with the Order of April 7 and—by its conditional acceptance with express reservation of rights and its simultaneous application for rehearing—sought to obtain a new ruling by the Commission. If anything as fresh as the Order of April 7, 1961, had to have anything to keep it alive as a matter within the continued reconsideration of the Commission at least during the 60-day period allowed for appeal to the Court of Appeals, the application for rehearing was more than enough. The petition for rehearing is not a one-way street. It seeks a reconsideration. A reconsideration carries with it the imminent prospect that things will be worse, not better, after rehearing.

Somewhat akin to this criticism is the further procedural one that the Letter Order of November 2, 1961, is of no consequence in this record. The Commission asserts that since this occurred prior to its certification of the record, the Commission continued to have jurisdiction. § 19(b), 15 USCA § 717r(b). But we do not have to decide this specifically. The reasons asserted, perhaps retrospectively, in support of its May 31 modification is but a forecast of the rationale elucidated by the General Counsel to sustain the Order. In any case, it is the Order that is in

issue. What the Commission says, as with the Court's opinion, is of great importance and its intrinsic weight is not affected by the time of its deliverance when, as was the case here, it is on a temporary certificate, as to which no formal record is or can be made. So far as the modification which allows the filing of the amended contract, previously rejected by the Commission, is concerned we regard that as an accomplished fact. It merely spells out what is otherwise so plain in the Commission's actions that it was permitting the sale under a contractual arrangement, but on the express positive condition that no increases in the rate would be allowed whether in, or not in, the contract.

The second complaint is more substantial. In effect it is that there was no reasonable basis for requiring a price reduction from 20¢ to 18¢. If the Producer were to establish this contention, it is not likely that, at this juncture, we would even reach the problem of the prohibition of § 4(d) increases.

Both as to the specific reduction in the initial sales price and in the related problem of requiring a price reduction—as distinguished from collection of the contract price under an obligation to refund the difference—great reliance is placed upon the decisions of the 10th and 7th Circuits in the cases reversing the BTU adjustment condition. *The Pure Oil Co.* v. *FPC,* 7 Cir., 1961, 292 F. 2d 350; *Sohio Petroleum Co.* v. *FPC,* 10 Cir., 1961, 298 F. 2d 465; *Eason Oil Co.* v. *FPC,* 10 Cir. 1961, 298 F. 2d 468; and see also from the 3d Circuit, *J. M. Huber Corp.* v. *FPC,* 3 Cir., 1961, 294 F. 2d 568. For our present purposes, we can accept the standards elucidated in those opinions, but they do not compel any reversal here.

It is important to bear in mind a factor we discuss in greater detail later on. We are here dealing with tem-

porary authorization. There is, and can be, no formalized record in the traditional sense. What tools are we to use, then, by which to construct a thesis showing that it was completely arbitrary for the Commission to have required an effective reduction in price? The Producer emphasizes the previous permanent certification of a 20¢ rate in the related sale. But aside from whatever uncertainty is now cast upon that decision,[11] we think a good deal of water has gone over the dam which at least warranted the Commission taking an individualized look. One, of course, is the policy Statement 61-1 with its area pricing approach whose fetal development ought not to be imperiled by prenatal traumas inflicted by restraints or restrictions from the judiciary. Equally important is the declaration from this and other Courts concerning the nature of the evidence required on the hold-the-line policy of CATCO.[12] In addition to these intervening events of

[11] There is some suggestion that this might be affected by the action of the Court of Appeals in Public Service Commission v. FPC, D.C. Cir., 1961, 295 F. 2d 140, cert. denied, December 18, 1961, 368 U.S. 948, 82 S. Ct. 388, 7 L. Ed. 2d 343, reversing the Commission's refusal to allow the New York Public Service Commission to intervene.

[12] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, cert. denied sub nom, Sun Oil Co. v. United Gas Improvement Co., 1961, 368 U.S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27; United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F. 2d 817, cert. denied sub nom, Superior Oil Co. v. United Gas Improvement Co., 1961, 365 U. S. 879, 81 S. Ct. 1030, 6 L. Ed. 2d 191, and California Co. v. United Gas Improvement Co., 1961, 365 U. S. 881, 81 S. Ct. 1030, 6 L. Ed. 2d 192; United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159; Public Service Commission of New York v. FPC, D.C. Cir., 1960, 287 F. 2d 146, cert. denied, sub nom, Hope Natural Gas Co. v. Public Service Commission of New York, 1961, 365 U. S. 880, 81 S. Ct. 1031, 6 L. Ed. 2d 192, and Shell Oil Co. v. Public Service Commission of New York, 1961, 365 U.S. 882, 81 S. Ct. 1030, 6 L. Ed. 2d 192.

considerable administrative-legal significance, the rates in all but the Chenango Field (see note 3, supra) carry ultimate rates considerably in excess of 20¢ Mcf. We are asked on this skimpy record, unaided either by traditional evidence or that of expert economists, to say as a matter of law that a contract with four built-in 2¢ escalations does not have an inflationary or triggering effect. On the assumption that the collection of the increases is ultimately allowed, it is quite plain that over the life of the contract the price for all gas delivered was 20¢ plus. We would assume that what is so inescapable as a matter of economics would be understood in the same way by practical men in the business of selling and buying natural gas.

Nor do we find any basis for attacking the Commission's choice between a reduction in the initial price, rather than an order permitting collection of the contract rates subject to refund. There are a whole host of problems, legal and administrative, wrapped up in this choice. In the Commission's limited facility for study of the probable ultimate merits of a sale when considering an application for temporary authority, the circumstances would, we think, have to be quite unusual to warrant a Court differing with this conclusion inevitably calling for the nicest of expert judgments.

But we view the express prohibitions of § 4 increases as beyond the pale of administrative discretion. We do not think that under the guise of a condition of a temporary authorization, the Commission can forbid what Congress has expressly allowed to a natural gas producer. We reach this conclusion by application of the principles discussed and followed in *Texaco, Inc.* v. *FPC,* 5 Cir., 1961, 290 F. 2d 149, and *American Liberty Oil Co.* v. *FPC,* 5 Cir., 1962, 301 F. 2d 15.

We do not, however, regard, as do the parties in various aspects, that either or both of these decisions is directly and positively controlling. As is perfectly plain, there is and must be a difference between a permanent certificate and a temporary authorization. Consequently, what is said in *Texaco* with regard to action permissible for a permanent certificate does not necessarily apply for a temporary.[11] On the other hand, the opposite is not necessarily true.

These cases start with the recognition that conditions may be imposed. And, of course, the factor deemed to be of such importance in *CATCO* was the beginning price. Thus, the Supreme Court held, the Commission, without making a rate case out of it, had the duty to take into account price as that might bear specifically, generally, immediately or remotely, on the public interest. In *Texaco* we did, of course, state that "The power of the Commission to condition a certificate is co-extensive with its power to reject or deny a certificate * * * because the power to reject an application for certificate completely is harsher than the power to grant it on any reasonable condition," 290 F. 2d 149, 156. But we did not intend this to declare that since the Commission had it within its actual power not to grant an application, it could therefore impose any conditions that, no matter how harsh in fact, were somewhat less than a complete refusal. We had earlier expressed it in terms such as these: "* * * it can hardly be argued that the Commission would not have had the power, *if it made a soundly based finding* that the public convenience and necessity did not warrant its granting of a certificate at an initial price higher than

[11] Along with shorthand references to § 4 and § 5 proceedings, etc., the words "temporary" or "temporaries" seem destined to become a part of the jargon too.

17.7 cents, to deny the certificate out of hand." 290 F. 2d 149, 155 (emphasis added).

The idea of reasonableness was therefore implicit in equating outright denial and grant subject to conditions. We spelled it out plainly in *American Liberty* where, of the grant of a temporary we declared, "This is not to say that the Commission can act arbitrarily, whimsically or in a manner that amounts to a clear abuse of its discretion." 301 F. 2d 15, 18. Elaborating on this we then adopted as our own the standards suggested by the Commission. "The reasonableness of the Commission's determination must be viewed in light of the summary and ex parte nature of a grant of such temporary authorization * * *" and "* * * the Commission's action * * * can be set aside only if the court were to determine that the order issuing a conditioned certificate was a clear abuse of discretion, i.e., arbitrary, whimsical, or capricious action, or that the order was otherwise as a matter of law erroneous on its face." 301 F. 2d 15, 18.

This envisages, of course, that there is a line past which the Commission may not go. The line is different for a permanent, rather than a temporary. The line may be a fuzzy one and difficult to locate. But somewhere there is a mark.

Up to now the line has not been permitted to go so far as to obliterate specific sections of the Natural Gas Act by requiring that one seeking to make an interstate sale must agree to forego and relinquish for an indefinite period of time safeguards and rights which Congress had established. On the contrary, what was done in *Natco* and by us in *Texaco* demonstrates that the necessity for conditioning a grant of a certificate is to fulfill the aims of the Act by an accommodation of all of its demands. Thus, the

Court in *Gatco* had this to say. "In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." 360 U.S. 378 at 391. In a very practical way we made just such an accommodation in *Texaco*. Thus, by rejecting a highly legalistic impediment supposedly founded on *Mobile*,[14] we categorically stated that the price condition in the certificate would not prohibit the producer from filing, as soon as the sales contract otherwise permitted, a rate increase under § 4 which would thereafter be subject to suspension and collection under the obligation of reimbursement. This was a recognition that while, as a condition to a grant, the Commission would require the parties to commence the sale at a price lower than that fixed in the contract, the contract thereafter did not cease to have vitality. The so-called "revision of the contract obligation" resulting from condition imposed by the Commission does not, we said, "amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to." 290 F. 2d 149, 156.

Without even remotely implying that a permanent and a temporary are to be treated always alike, we can see no distinction in this area when viewed either as a matter of statutory power in the Commission or

[14] United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

statutory rights accorded to a natural gas producer, or both. If, as we held may legally be done, the producer may increase rates and thereafter collect them subject to suspension and refund under § 4, it is obvious that the *Catco* price "line" sought to be maintained by the condition is not the one currently being observed after the permissible § 4 increase. From the standpoint of the payments the purchaser is required to make, the actual price is in fact above the "line." Of course that makes maintenance of price line something less than completely effective. But that is the unavoidable consequence of a unique statutory regulatory scheme in which, as *Mobile* (see note 14, supra) points out, rates are initially prescribed (and increased) by private contract. Not everything is lost, however, since, as *Catco* contemplated, any contract increases are collected subject to refund. Additionally, this puts the burden of establishing lawfulness of the rates on the producer. Also it eliminates the prospect of irretrievable excess payments even though, in a lumbering and prolonged § 5 rate investigations, the initial price is found to be too high. Veiwed in this light we see no real distinction between a permanent and a temporary. Both in terms of the effectiveness and in terms of economic impact, the collection of a post-condition § 4 increase is the same for a temporary as for a permanent.

To allow this prohibition of § 4 condition, we would be as much as saying that in determining whether the addition of the proffered gas to the interstate market serves the public interest the rates to be prescribed are not those fixed under the sales contract by the parties. Rather the rates are those (a) fixed by the Commission in the first place and which are to continue until (b) the Commission itself fixes another level. This is a complete abandonment of the

approach deliberately selected by Congress and which, all must agree, was a radical break with traditional utility-type regulation.

The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to an administrative agency. There is, first, the status of the producer under a temporary. His rights may be temporary, but his duties are not, or at least on the present holding they are not. Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under § 7(b), 15 USCA § 717f(b). *Sun Oil Co.* v. *FPC*, 1960, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639; *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623; *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, 266 F. 2d 208. That means that, for good or evil, a producer under a temporary is subject to all of the regulations, restraints and duties of a natural gas company, § 2(6), 15 USCA § 717a(6). Nothing in § 4 or in § 7 outlining the grant of certificate, or anything elsewhere in the Act takes from such producer the rights as a natural gas company which the law accords as a part of the duties imposed. Such producer is required under § 4(a) as a "natural-gas company" to maintain "just and reasonable" rules, regulations and rates, is forbidden under § 4(b) to "make or grant any undue preference" in "rates, charges, services, facilities * * *" and under § 4(c) is obliged to maintain and "keep open * * * for public inspection" its "schedules showing all rates and charges for * * * sale * * *," and under § 4(d) to make no change, without Commission approval, except upon "thirty

days' notice." Finally, the critical § 4(e) prescribes that such proposed rate shall be in effect. It first provides that whenever a new rate is filed by a natural gas company "the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate * * * and, pending hearing * * * may suspend the operation of such schedule and * * * rate, * * * but not for a longer period than five months * * *." But it then goes on to provide that "If the proceeding has not been concluded and an order made at the expiration of the suspension period * * *" then on motion of "the natural gas company" the "proposed * * * rate * * * shall go into effect * * *."

Moreover, this subjugation of such a producer under a temporary to the almost perpetual control of the Commission is more than an academic theoretical. It is a clear and present—and largely unavoidable—fact. It is no reflection on the Commission or its over-burdened and energetic staff to take practical cognizance of the great delay in processing these matters. On the contrary, one can have only a genuine respect for the manner in which all grapple with this monumental and increasingly unmanageable task as the result of fallout from *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035. But despite strenuous efforts and the importation of resourceful, new plans and methods for coping with it, the fact is that progress is slow, so slow indeed that it is hardly progress.[18]

---

[18] In the report of the Commission, Opinion No. 338, in the *Phillips* case of September 1960, 24 FPC 537, demonstrating the absurdity of a traditional cost of service approach, the Commission described its plight in these words. "An illustration of the administrative impossibility of separate determinations for all producers' rates is found in the fact that there are 3,372 independent producers with rates on file with this

Even from our remote position, it seems safe to conclude that never will the Commission be able to process certificates on an individualized basis. The hopes for a practical solution must rest in generalized area-pricing or similar resourceful adaptations of law and

---

Commission. The producers have on file with us 11,091 rate schedules and 33,231 supplements to these schedules. Currently, 570 of these producers are involved in 3,278 producer rate increase filings now under suspension and awaiting hearings and decisions. The number of completions of independent producer rate cases per man-year during the first 6 years following the Phillips decision indicate that nearly 13 years would be required for our present staff to dispose of the 2,313 cases pending on July 1, 1960. Within this 13-year period an additional estimated 6,500 cases would have been received.

"Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one-half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968—eight and two-tenths years from now. * * *." 24 FPC at ——.

The Commission, with whatever help it can marshal from Congress, perseveres in its determination to make some headway. Justifiably pointing to some improvement the Commission's outlook is very guarded. The Commission's first quarterly report (Release No. 11,991; G-6559) of May 1962 reflects that "* * * the Commission had made a small reduction in its backlog of independent producer gas certificate cases during the year * * *," reducing them from 3,122 to 3,026. But in the 3,026 producer certificate cases pending as of March 31, 1962, a total of 2,096 have been granted temporaries. Headway is being made. In the first quarter of calendar year 1962, a total of 606 certificate cases were disposed of in contrast to 217 in the previous quarter and 301 in the same quarter of 1961. However, the backlog will be a long time fixture for against 606 dispositions, there were 423 new filings. At today's pace the dispositions exceed new filings on an annual basis

life.[16] But assuming its legal validity will be upheld broadly enough to make it effective, even this can not be counted on for much immediate help. Speaking of this "new system" of area pricing and the time before it can be established, Judge Prettyman stated (see note 16, supra), "This period will be long, estimates running from four to fourteen years."[17]

This is important for we have to view Commission action in terms of its broad and inescapable impact. It is no answer to the awesome implications thus revealed to suggest that as to these particular dockets, the Commission has, so we are informed, assigned

---

by a net of some 720 cases. Thus it will take 4½ years to eliminate the backlog of 3,026 cases.

In independent producer rate filings and actions, there were 2,845 filings under suspension aggregating $168,654,424. Many of these are involved in the two area rate proceedings, one of which is now in progress in Docket No. AR61-1, but the Commission concludes a "significant decrease in number of suspensions on hand is not anticipated pending conclusion of [the first area rate] hearing."

The Commission through its chairman is currently seeking a 31% increase in appropriations to obtain an adequate staff to eradicate this obstacle.

[16] The hopes and fears of all the years—for the natural gas business at any rate—is portrayed by Judge Prettyman with his characteristic brilliance in the opinion of the Court of Appeals sustaining the Commission's decision in the *Phillips* case. State of Wisconsin v. FPC, 16175; Long Island Lighting Co. v. FPC, 16177; People of the State of California v. FPC, 16180, D.C. Cir., 1961, — F. 2d —. With certiorari having been granted, —— U.S. ——, —— S. Ct. ——, 8 L. Ed. 2d 275 [30 L.W. 3353], the decision of the Supreme Court will be portentous.

[17] In seeking the increased appropriations (note 15, supra), the chairman is reported as testifying that the present Permian Basin area rate proceeding would not be settled for a year or two. Moreover, until it and the South Louisiana proceeding are well along, the Commission would not likely initiate any others.

them to a hearing which, perhaps by now has actually taken place. The problem presented in these hearings will be essentially the one presented in *Catco* and if it, and the many other numerous cases coming to this Court from the Commission, are any guide, it is almost certain that we are dealing with orders which cannot become final for two or three years more." Time is therefore important. Time is a part of the problem for adjudication. In view of the structure of the Natural Gas Act, this time is irreplaceable to the producer. This is so even though the decision of the Commission on the grant of the permanent or, perhaps even later, in a § 4 or § 5 determination of just and lawful rates approves the proposed initial contract rate (or at least one higher than the conditioned rate).

And finally, the condition is so awesome because—and it is no more *reductio ad absurdum* to say—if the Commission may set aside § 4 and the rights, privileges and protections which it accords to a natural gas company subject to all of the obligations of the Act, then there is no end to the legislative tampering which the Commission may undertake. It may just as well deny the producer the right of review by rehearing or petition to the Courts under § 19(b).[19] Or it might

[18] Any specialized treatment of pending certification applications likewise tends to imperil either the utility, or the broad legality, of the area pricing system envisaged in 61–1. By its terms the rates specified in the appendix "are for the purpose of guidance and initial action by the Commission" for use by it "in the absence of compelling evidence calling for other action" in passing upon "proposed initial sales" and "* * * rate changes filed under existing contracts which call for a rate exceeding the indicated price level * * *."

[19] As to this we are not here dealing with academic theorectical. For the Producer, pursuing essentially what the Commission has done with regard to the post-record letter of No-

just as well conclude that the producer's operations are uneconomic because of doubtful reserves or a current exploration program and condition the grant of a temporary on divestment of unprofitable leases or the cessation of wildcat drilling.[20]

---

vember 2, 1961, has brought to our attention a current temporary (Docket No. C162-216 of October 6, 1961) in which to a condition [2] fixing the rates to "remain in effect until changed by Commission order" the Commission attaches another condition that the producer not seek any rehearing or review:

"(3) The temporary authorization with conditions attached shall be accepted as issued and without reservations for further review after commencement of service, within 30 days herefrom by written acceptance * * *. If reconsideration of such temporary authorization is sought, service hereunder shall not be started. If service is commenced under this authorization, the conditions attached shall be effective and the service may not be discontinued without permission of the Commission * * *."

[20] So long as FPC v. Panhandle Eastern Pipe Line Co., 1949, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499, stands, § 1(b) denies power to do this.

The condition is erroneous on its face and the cause must be reversed and remanded for further consistent proceedings.[21]

Congress has subjected a temporary natural-gas producer to § 4 and all other parts of the Act. Congress has extended to all natural gas companies, permanent or temporary, the protection and rights of § 4 and the Act. Each is interlocked.

That which Congress had joined together, let not the Commission put asunder.

REVERSED AND REMANDED.

---

[21] We do not undertake to blueprint the matters requiring reconsideration. But it is quite clear that as condition [1] as amended (notes 6, 8, 10) was illegal and void, the filing of the amended contract and the proposed rate increase were legal. The rate represented by the proposed increase became effective on its filing subject to a maximum of five months' suspension. But since it is a certainty that the Commission would have exercised the right of suspension, the collection thereafter must be deemed to have been under an order for refund.

Adm. Office, U.S. Courts—Scofields' Quality Ptrs., Inc., N.O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19213

H. L. HUNT, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued on May 31, 1961 and July 26, 1961, in Docket No. C161-1282, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is

hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

Issued: July 19, 1962.[1]

---

[1] The judgments involving the other respondents (petitioners below) are identical in form.

APPENDIX C

STATUTES INVOLVED

The Natural Gas Act, Section 4, 15 U.S.C. 717c and Section 7(b), (c), and (e), 15 U.S.C. 717f(b), (c) and (e), provides as follows:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the

date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1] or upon its own initiative without complaint, at once, and if it so orders, without answer or

[1] Subsection 4(e) was amended May 21, 1962 by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or

charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * *

Sec. 7 * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c)[2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless

[2] Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][3]

* * * * *

---

[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present

been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] See footnote 2.

or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

U.S. GOVERNMENT PRINTING OFFICE: 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, Trustee for Hassie Hunt Trust; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, Trustee for Caroline Hunt Trust Estate; A. G. HILL, Trustee for Lamar Hunt Trust Estate, *Respondents*.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT W. HENDERSON
THOMAS G. CROUCH
700 Mercantile Bank Building
Dallas, Texas 75201

ROBERT E. MAY
RICHARD F. GENERELLY
JOHN T. KETCHAM
May, Shannon and Morley
1700 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondents, H. L. Hunt, et al.

August 15, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, Trustee for Hassie Hunt Trust; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, Trustee for Caroline Hunt Trust Estate; A. G. HILL, Trustee for Lamar Hunt Trust Estate, *Respondents*.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A, pp. 17-38) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings were entered on July 19, 1962 (Pet. App. B, pp. 39-40). A petition for rehearing en banc filed by the Commission on August 23, 1962, was denied by the court on April 16, 1963. The Commission would invoke the jurisdiction of this Court to review the judgments below under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that, while the Commission could condition its authorization of a sale of natural gas by an independent producer under Section 7 of the Natural Gas Act upon a specific reduction in the proposed initial price, the Commission could not properly condition such authorization to preclude the producer from seeking a determination of the justness and reasonableness of his proposed price by the filing of a rate increase application under Section 4(d) of the Act.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4 and 7(b), (c) and (e); 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) appear in Appendix C to the petition for certiorari, pp. 41-47. The provisions of Sections 5(a), 15(a) and 19(b) of the Act, as amended, are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

Respondents are independent producers of natural gas. As such, their sales of gas for resale in interstate commerce are subject to regulation under the Natural

Gas Act by the Federal Power Commission. The cases below arose on petitions filed by Respondents to review orders of the Commission granting Respondents temporary certificate authorization under Section 7(c) of the Act for new sales of gas. The orders complained of required, as a condition of such authorization, that Respondents reduce their proposed initial price to the pipeline purchaser and, further, that Respondents forego the right to seek their initial contract prices under the rate changing procedures of Section 4(d) of the Act pending further order of the Commission. Respondents sought review of both conditions.

The court of appeals based its decision on this Court's decisions in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*"Catco"*), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (*"Mobile"*). While upholding as reasonable and proper the requirement that Respondents reduce their initial price as a condition of being permitted to sell their gas, the court held that the Commission had exceeded its statutory authority in requiring that Respondents relinquish the right to make rate filings under Section 4(d) once their sales had begun.

Rejecting the Commission's contention that a limitation on the filing of rate changes was required by the temporary and *ex parte* nature of the authorization granted Respondents, the court found that Respondents had subjected themselves fully to all of the duties and obligations of natural gas companies when they dedicated their gas to the interstate market. This being so, the court held that the Commission could not lawfully take from Respondents rights and safeguards accorded natural gas companies by the Act as a part

of the duties imposed. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to Respondents by Congress, namely, the right to make and change their rates in the manner prescribed by Section 4(d) of the Act.

ARGUMENT

The Commission asserts three grounds for the issuance of a writ of certiorari: (1) that the decision of the court below is in conflict with the decision of the Third Circuit in *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission*, 203 F. 2d 494; (2) that the decision below unduly restricts the Commission's power to condition its authorization of gas sales by independent producers; and (3) that the court's decision, if allowed to stand, will seriously hamper the Commission's ability to protect consumers of gas from unreasonable charges. None of the grounds asserted warrants the granting of certiorari. There is no conflict of decisions and, despite the Commission's effort to create one, no issue relating to its authority under the Natural Gas Act which has not already been determined by this Court and which was not correctly decided by the court of appeals.

1. The claimed conflict between the Third Circuit's decision in the *Alabama-Tennessee* case, *supra*, and the decision below plainly does not exist. In *Alabama-Tennessee*, the pipeline company, unlike the producer Respondents below, agreed to and in fact requested the condition requiring that it maintain its interim tariff in effect during a fourteen-month period following the commencement of operations. By contrast with Respondents, who were required to reduce their initial

price pending further order of the Commission on their applications for certificates, Alabama-Tennessee was allowed to collect during its developmental period tariff rates higher than those which it had originally proposed at the hearing on its certificate application. When it sought to continue the collection of the higher interim rates at the expiration of the development period, the Commission rejected its proffered rate filing and entered upon a hearing under Sections 5, 7 and 15 of the Act to determine not only a satisfactory form of tariff but the "just, reasonable, non-preferential [and] non-discriminatory rate" to be thereafter observed (10 F.P.C. 1638, 1640). A subsequent rate increase filing, made in the course of the hearing, was rejected on the ground that the issue of what was a just and reasonable rate for the company was then being determined. The interim rates were continued in effect until reduced at the conclusion of the hearing.

It was thus in the context of an appeal from a final order determining a just and reasonable rate for Alabama-Tennessee that the Third Circuit rendered its decision. As Judge Hastie pointed out in the court's decision (203 F. 2d at 497), the reasonableness of the Commission's certificate condition was not challenged by Alabama-Tennessee and, unlike the case below, was not an issue on appeal. Moreover, the Third Circuit clearly did not have before it an order which purported to make it impossible for the company, without prior Commission consent, to seek a determination of the justness and reasonableness of its initial rate, nor did it have before it an order which prevented Alabama-Tennessee from collecting its proposed initial rates pending the outcome of future proceedings.

2. The Commission points out that, unlike the situation in *Alabama-Tennessee,* where the pipeline had been permanently certificated after notice and hearing, there had been no hearing on Respondent's applications when they began delivering gas under emergency authorization and hence, the Commission contends, no showing by Respondents that the public convenience and necessity would be served by a certification of their sales (Pet., p. 7). From this the Commission concludes that it may, "at a minimum," insist that Respondents and other producer-applicants sell their gas while under temporary authorization at rates which will not disturb the existing price line pending a final disposition of their certificate applications (Pet., p. 9). The Commission's conclusion is erroneous.[1]

In *Catco, supra,* the Court recognized that, while rates were not the only factor bearing on the public

---

[1] Contrary to the Commission's contention that Respondents had demonstrated none of the "elements" (Pet., p. 9) which would justify permanent certification of their sales, Respondents supplied the Commission with all of the information required by the Commission's rules for permanent certification when they applied for temporary authorization, *i.e.,* their applications and their sales contracts evidencing their market. More important, when Respondents began their deliveries of gas at a reduced initial price acceptable to the Commission, they became as fully subject to the requirements of the Natural Gas Act as a producer holding a permanent certificate of public convenience and necessity issued after notice and hearing. The court below noted this fact (Pet. App. A, p. 32), and we do not understand the Commission to contend otherwise. We know of no instance where, after notice and hearing, the Commission has directed the cessation of a sale begun under temporary authorization based on a finding that the public interest did not require a continuation of the sale. Rather, the Commission has consistently taken the position that it would lack authority to order an abandonment of a sale, absent the filing of an application by the producer under Section 7(b) of the Act. *E.g., Socony Mobil Oil Co., Inc.,* 27 F.P.C. 675, 676.

convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Where the producer's application on its face or on presentation of evidence signals the existence of a situation which would not be in the public interest, the Commission was admonished either to deny the certificate or to condition the certificate issued in such a manner as to reduce the initial price at which the producer's gas is permitted to enter the market. Where, in its discretion, the Commission chooses to condition its certificate, the Court found that:

> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act; United Gas Pipe Line Co. v. Mobile Gas Service Corp. (US) supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act" (360 U.S. at 391-92).

Responsive to the Court's mandate in *Catco,* the Commission has, since *Catco,* held the price line in the issuance of permanent certificates to producers by what is in essence an "in line" determination based on weighted average field prices and has deferred the determination of just and reasonable rates to further proceedings under Sections 4 and 5 of the Act. The

Commission has followed essentially the same procedure in conditioning the prices at which it will allow producers to dedicate their gas under temporary authorization. Where the initial price set out in the producer's contract appears to be "out of line" with the guideline area price contained in the Commission's Statement of General Policy No. 61-1 (18 C.F.R. § 2.56), the Commission has uniformly conditioned the initial price in its grant of temporary authority at or below the guideline area price in the Policy Statement.

Thus, with respect to all new sales of gas by producers since the Court's decision in *Catco*, whether begun under permanent or temporary certificate authority, the Commission has followed the Court's mandate in exercising its conditioning power under Section 7 of the Act to hold the line pending a determination of just and reasonable rates under Sections 4 and 5. In so doing, the Commission has afforded consumers the full protection contemplated by the Court in *Catco*, while preserving the producer's "remedy to protect himself" (360 U.S. at 389), namely, the right to increase his rates, subject to refund, pending a determination of their justness and reasonableness under Section 4 of the Act. *Accord, Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156.

The Commission's insistence that it must now have, at a minimum, the power to prohibit rate increase filings by independent producers amounts to an argument that consumers be afforded a greater degree of protection than the Court in *Catco* found was intended by Congress. It represents, moreover, an assertion by the Commission that, in the exercise of its conditioning power under Section 7 of the Act, it may suspend initial prices agreed upon by the parties, notwithstand-

ing the Court's clear holding in *Catco* that "the Commission was not given the power to suspend initial rates under § 7" (360 U.S. at 390). The Commission's assertion that its powers under Section 7 may be thus enlarged *sua sponte* is erroneous and was correctly held so by the court of appeals.

3. The contention that the decision below, if allowed to stand, will have a far-reaching practical effect on the Commission's ability to protect the consumer is nothing more than an argument of administrative convenience. Any dissatisfaction the Commission may feel regarding the powers given it under the Natural Gas Act to cope with the burden of producer regulation can hardly justify its action in prohibiting the exercise of rights reserved to producers regulated under the Act. The Commission is a creature of Congress and its powers are limited to those conferred by Congress. *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316; *Stark* v. *Wickard*, 321 U.S. 288, 309; *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 432-33; *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74; *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. 2d 392, 397 (8th Cir. 1948), *cert. denied*, 335 U.S. 853.

With regard to the Commission's argument that refunds are neither a complete nor perfect remedy considering the difficulties and delays inherent in its determination of just and reasonable rates, we can only observe, as did the court below (Pet. App. A, p. 31), that this is the unavoidable consequence of a unique statutory regulatory scheme in which, as *Mobile supra*, points out, the rates of natural gas companies are initially fixed and changed by private contract. Any change in the scheme must be made by Con-

gress. In this regard, the Third Circuit's decision in *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 202 F. 2d 899, is particularly apt. In holding that the Commission had improperly rejected, "without color of statutory authority," a Section 4 rate filing by the company, Judge Hastie, speaking for the court, said:[2]

> "We can understand, as the argument in this case has seemed to imply, that the Commission may have had to contemplate serious injury to the public interest because of its inability with very limited funds and staff to perform the enormous task of investigation and analysis imposed upon it in times when so many public utilities are submitting important proposals within its jurisdiction and the statutory scheme requires it to act promptly or let proposals go by default. But the remedy lies with Congress. If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them. Viewed in most favorable light, that seems to us to be what the Commission has tried to do here. It follows that the order . . . [rejecting the company's Section 4 filing] must be set aside as wholly beyond the authority of the Commission" (202 F. 2d at 902-03).

The Commission states that more than 2,000 producer applications for certificates are now pending

---

[2] Judge Hastie, in delivering the court's opinion, spoke for the same panel of the court which, some two months later, decided *Alabama-Tennessee, supra.*

and that, if the decision below is allowed to stand, the sheer volume of applications involved may well require the Commission, in the interest of consumer protection, to deny requests for temporary authority where an increase in its guideline area prices would be threatened by the grant of such authorization (Pet., p. 14). This implicit threat to producers is deserving of little comment. As the Commission itself recognizes, the consuming public has as much of an interest in a continuing source of gas supply as does the producer. The Commission has responded to the peculiar nature of the producing industry's problems by making available a procedure for emergency authorization whereby the producer, faced with the drainage and flaring of his gas, and often the loss of his leases, may bring his wasting asset to market with a minimum of delay. The Commission approves or conditions downward the price at which that asset may initially enter the interstate market. In so doing, it exercises its conditioning powers under Section 7 of the Natural Gas Act in the public interest to hold the price line pending a determination of the producer's just and reasonable rate. It cannot and is not required to do more.[3]

Finally, as the court below noted (Pet. App. A, pp. 36-37), if the Commission may suspend statutory filing rights under Section 4 of the Natural Gas Act, it may just as well deny producers the right of review by

[3] Of the 2,000 pending certificate applications referred to by the Commission, we would suggest that the vast majority will be permanently approved within the very near future under new procedures recently worked out by the Commission. Under these procedures the Commission itself hears and decides producer certificate cases where the initial price proposed by the producer is at or below the area level and no protest has been filed. See FPC Press Release No. 12833, issued July 25, 1963.

rehearing or petition to the courts under Section 19(b) of the Act. The court further noted that this possibility was not in the realm of the academic theoretical since just such a condition is currently being attached to temporary authorization granted independent producers. We believe that in principle there is no difference between Section 4 of the Act and Section 19(b) and that a condition prohibiting the exercise of rights under either section is clearly unlawful.

CONCLUSION

The petition for certiorari involves no conflict of decisions, no question of statutory interpretation not already settled by the Court, no important question of administrative law and no judicial action justifying the exercise of the Court's supervisory powers. The decision of the court of appeals was eminently correct, and the petition for certiorari should be denied.

Respectfully submitted,

ROBERT W. HENDERSON
THOMAS G. CROUCH
700 Mercantile Bank Building
Dallas, Texas 75201

ROBERT E. MAY
RICHARD F. GENERELLY
JOHN T. KETCHAM
May, Shannon and Morley
1700 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondents,
H. L. Hunt, et al.

August 15, 1963

APPENDIX

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717d(a)]

* * * * * * * * * *

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose

participation in the proceeding may be in the public interest. [52 Stat. 829 (1938); 15 U.S.C. § 717n(a)]

* * * * * * * * * *

SEC. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended; 15 U.S.C. § 717r(b)]

INDEX

715-200—63——1

CITATIONS

Cases:

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, PETITIONER

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 323–337) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's orders were entered on July 19, 1962 (R. 338–344). A timely petition for rehearing was denied on April 16, 1963 (R. 344). The petition for a writ of certiorari was filed on July 15,

1963, and granted on October 14, 1963 (R. 345). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer applying for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act also requests, on emergency grounds, the grant of temporary operating authority, may the Commission condition such temporary authorization upon the applicant's maintaining a prescribed initial price pending final disposition of the application?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, and of the Commission's Regulations Under the Natural Gas Act, 18 C.F.R. Subchapter E, are set out in the Appendix, *infra*, pp. 40–46.

STATEMENT

This case involves seven temporary authorizations of sales of natural gas issued to independent producers by the Federal Power Commission under Section 7 of the Natural Gas Act.[1] In each case, the Commission conditioned the temporary authorization upon the producer's (1) charging an initial price lower than the contract price and (2) maintaining that price

[1] *E.g.*, R. 15–17, 86–87, 87–89, 113–115, 168–170, 204–205.

without increase during the period of service under temporary authorization.

The court below approved the condition reducing the initial price. However, it set aside the Commission's order on the ground that the Commission lacked authority, in the exercise of its certificating powers, to prevent a producer from filing and putting into effect a contractually authorized increased rate, even during the term of a temporary authorization.

The Commission proceedings.—The procedural histories of the seven temporary authorizations are substantially the same, although there is some variation in the dates of some of the relevant occurrences and in the gas fields involved. As the court below indicated (R. 824), it is sufficient to describe the Commission proceedings relating to the sale by the Hassie Hunt Trust from the Alta Loma area in Galveston County, Texas,[4] as typical of all. This was a sale pursuant to a contract dated December 15, 1959.

In the preceding July, a permanent certificate had been issued authorizing sales from the Alta Loma and other areas to Peoples Gulf Coast Natural Gas Pipeline Company. *Peoples Gulf Coast Natural Gas Pipeline Co.*, 24 FPC 1 (R. 99). The Commission order had conditioned the issuance of that certificate upon the filing by the producer of a contract amendment to

[4] This is F.P.C. Docket No. C161-1283. One other subject sale was made from the same area. The others were made from Alvin City and Chenango Fields, in Brazoria County, Texas. (R. 2, 142, 824). All the sales are from Texas Railroad District No. 3 (R. 824).

provide for an initial price of 20 cents, with a single 3-cent escalation after ten years, rather than an initial price of 20 cents with four 2-cent escalations at four-year intervals as originally provided. 24 FPC at 9. The July 1960 order, however, was defective. The Public Service Commission of New York had been denied intervention in the Commission proceeding—intervention which it had sought in order to contend, pursuant to the principles of *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*), that an initial price lower than the 20-cent contract price was required. On review, the denial of its intervention was held erroneous. *Public Service Commission of New York* v. *Federal Power Commission*, 295 F. 2d 140 (C.A.D.C.), certiorari denied *sub nom. Shell Oil Co.* v. *Public Service Commission of New York*, 368 U.S. 948. To remedy the error,[3] the Commission on November 2, 1961, entered an order vacating the issuance of the certificate and ordering a new hearing on the initial price question. *Hassie Hunt Trust*, 26 FPC 689.[4]

---

[3] The court's order had not in terms set aside the certificate order since the order under immediate review was that denying intervention. An earlier decision of the Court of Appeals for the District of Columbia Circuit had held that a denial of intervention must be reviewed immediately and independently of the final decision on the merits of the proceeding in which intervention was sought, but that the Commission could not, by proceeding to a decision on the merits, moot the intervention question. *Public Service Commission of New York* v. *Federal Power Commission*, 284 F. 2d 200.

[4] This vacating order is now being challenged. *Placid Oil Co.* v. *Federal Power Commission*, C.A. 5, No. 19500, and *Margaret Hunt Hill* v. *Federal Power Commission*, C.A. 5, No. 19499.

Subsequent to the issuance of the July 1960 certificate, the Commission issued its statement of General Policy No. 61-1, 18 C.F.R. 2.56, 24 FPC 818, announcing the prices which would be used as guides in determining whether proposed initial rates should be certificated without a price condition. The guideline rate for initial prices for Texas Railroad District No. 3 (from which all of the present sales are made) was 18 cents per Mcf, or 2 cents less than the initial price allowed by the July 1960 order.

Thereafter, on February 27, 1961, the Hassie Hunt Trust applied to the Commission for a certificate of public convenience and necessity to make the sales in issue here from a new well in the same area. The proposed sales were to Natural Gas Pipeline Company of America, the corporate successor to Peoples Gulf Coast (R. 74-87). In addition, it sought temporary authorization to begin service immediately, alleging the existence of an emergency situation resulting from the "necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than Natural" (R. 80).[4] The new sale was covered by a twenty-year contract calling for an initial price of 20 cents per Mcf with four 2-cent escalations at four-year inter-

[4] Section 7(c) of the Natural Gas Act, *infra*, pp. 43-44, authorizes the issuance of temporary authority "in cases of emergency." Implementing that Section, the Commission has promulgated rules (18 C.F.R. 157.28(c)), which recognize that any one of various types of threatened physical or economic loss (flaring, drainage of gas, threatened loss of lease, economic hardship from payment of shut-in royalties) may constitute an emergency.

vals, as had the original contract in the earlier sale (R. 85). This meant not only that the initial contract price exceeded the previously announced guideline but that, in light of the escalation provisions, the weighted average price over the 20-year term of the contract would be higher than the Commission had ever certificated without condition in Texas Railroad District No. 3 (R. 144–145, 325).

The Commission, on April 7, 1961, granted the temporary authorization subject to the conditions that (1) the total initial price not exceed 18 cents per Mcf; (2) within 20 days supplements to rate schedules and revised billing statements be filed consistent with the prescribed price condition; and (3) the temporary authorization be accepted in writing within 20 days (R. 87).

The producer commenced deliveries on April 19, 1961 (R. 134–135). Not until May 5, 1961, however, did it file a purported acceptance of the temporary authorization.* That "acceptance" reserved the right to seek removal of the conditions imposed and to seek an increased rate in accordance with the terms of an amended rate schedule concurrently tendered. The amended contract provided that the initial price would be 18 cents per Mcf for the first thirty days following commencement of deliveries and 20 cents thereafter (R. 91–92, 130–138). At the same time, the producer applied for rehearing of the order imposing the conditions (R. 93–133).

---

*With respect to the four sales from Chenango Field, n. 2, *supra*, p. 3, the producers filed acceptances of the temporary authorizations (R. 176, 206) prior to commencement of deliveries on September 28, 1961.

On May 31, 1961, the Commission denied rehearing (R. 113–115). It also rejected the purported acceptance since the amended rate schedule appeared to authorize an increase from the 18-cent rate during the period of the temporary authorization, a change that would be inconsistent with the condition specifying the 18-cent initial rate. To remove any possible doubt as to the meaning of the condition, the Commission modified its language to provide expressly that no change from the 18-cent rate could be made for the duration of the temporary authorization (R. 113–114). By the same order the Commission also rejected a notice of change to a 20-cent rate which the producer had tendered for filing on May 12, with a requested effective date of May 19 (R. 130–136).[7] The Commission later denied a renewed application for rehearing (R. 115–129) and rejected the re-tendered (R. 141–142) 20-cent rate filing (R. 142–143). Timely petitions to review followed.

On November 2, 1961, prior to the certification of the Commission's record to the court below (*i.e.*, within the statutory period during which the Commission retains jurisdiction to modify orders under review, Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r (b)), the Commission sent a letter order to the producer which amplified the previous orders and modified them in one respect (R. 144–145). The Commission said it would permit the amended rate schedule[8] to

[7] No increased rate filings have been made with respect to the four sales from Chenango Field.

[8] Section 154.93 of the Commission's Regulations Under the Gas Act defines "rate schedule" to mean the basic contract as amended. 18 C.F.R. 154.93.

be filed, explaining, however, that such a filing would be accepted solely to permit the Commission files to reflect the terms of the contract existing between producer and purchaser and that the acceptance "should not be construed as permission for you to file for an increased rate pursuant to Section 4(d) of the Natural Gas Act during the pendency of the temporary authorization." (R. 147). The Commission also explained that the initial-rate condition of 18 cents had been imposed in accordance with its Statement of General Policy No. 61-1, 18 C.F.R. 2.56, and that (R. 147-148):

> * * * The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases. It has not been shown that the public interest will permit temporary authorization of the proposed sale without the condition heretofore prescribed by the Commission to prevent such consequences.

The decision below.—The court below held that the imposition of the 18-cent initial price condition was justified, and that the Commission had the power under the terms of Section 7(e) of the Act to condition a temporary authorization upon a reduction of the initial rate, thereby rejecting the producers' contention that the Commission's authority to protect consumer interests was limited to allowing collection of the contract price subject to refund. It also held that the Commission had the power, on an application for rehearing, to specify more stringent requirements or conditions than those made explicit in its original order.

Recognizing that collection of a price in excess of 18 cents during the term of the temporaries might make "maintenance of price line something less than completely effective" (R. 333), the court nevertheless held that the Commission could not lawfully condition temporary authorizations so as to prohibit the filing and collection of increased rates pursuant to Section 4 of the Act.

SUMMARY OF ARGUMENT

I

The court of appeals has held that the Commission, in granting the *ex parte* request of an independent producer for a temporary authorization to sell natural gas, may not impose a condition prohibiting the applicant from increasing its initial rate during the pendency of its application for permanent authority. Its view is that the agency exhausts its authority un-

der the certificate provision of the Act (Section 7), whether the grant be a temporary or a permanent one, when it examines the initial rate, and that thereafter it must look to its rate-control powers (Section 4) to deal with escalations in that rate.

Section 7, however, expressly empowers the Commission to incorporate reasonable terms and conditions in its grants of authority. What a producer proposes to charge for its gas next month or next year is surely no less relevant to the public convenience and necessity than what it proposes to charge today. Consumer protection is the touchstone of the Act, and the duty to scrutinize initial rates with care (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*)) imports a similar duty to evaluate the consequences around the corner. The fact that the Commission also has rate powers hardly suggests that it should exercise its powers of certification, which were purposefully drawn in broad terms, with a blind eye to the rate problems which might be promptly generated by an unconditional grant.

The point is given added emphasis by the consideration that rate regulation is far from a perfect tool. Rate proceedings, to begin with, are often long and burdensome. More than that, however, initial rates can only be suspended for a limited period. When they become effective, they may have untoward consequences upon the price structure, e.g., through triggering the rates of other producers, even if they are ultimately rolled back. Finally, refunds to those

who have been charged excessive rates in the interim constitute a remedy of only limited effectiveness. *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145.

If two gas producers seeking authority came before the Commission with contracts of sale which were identical, except that one provided for escalations in 30 days and the other for comparable escalations in three years, it could not be doubted that the Commission might properly prefer the application of the ~~former~~ LATTER. By the same token, we submit that it may tender authority to the ~~latter~~ FORMER conditional upon its filing no increase for the longer period. The fact that a producer is limited by its contract (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332) does not mean that the Commission's powers of certification are subordinate to that contract and that it may impose no added restrictions.

II

What has been said above applies with special force to an applicant which has invoked the Commission's purely discretionary power to issue a temporary or interim authorization on the ground that it may suffer loss while awaiting the outcome of permanent certificate proceedings. Temporary grants are characteristically made without a hearing and without opportunity to consider objections from parties (including consumers) who might be adversely affected. It is particularly incumbent upon the Commission in such a case to safeguard the public interest

by insisting upon the maintenance of a rate which is "in-line". As already observed, the very collection of excessive rates may cause injuries which are not fully remediable. It would be anomalous if such injuries were to be occasioned by producers which had not yet demonstrated that they should be authorized to sell their gas in interstate commerce.

The Third Circuit has concluded, for these reasons, that a natural gas company operating under an interim authorization is impliedly obligated to maintain the *status quo* until the terms and conditions of its operations are finally fixed by permanent certificate provisions. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494. The instant case is stronger than *Alabama-Tennessee,* for here the prohibition upon the producer was an express one.

We submit, finally, that a producer taking with plain notice that the authorization to commence sales in interstate commerce is subject to the condition that it maintain the *status quo* pending hearing and final determination is estopped, once it has begun to operate under that certificate, to attack the condition upon which the grant of authority was conferred. Cf. *Callanan Road Co.* v. *United States,* 345 U.S. 507.

ARGUMENT

INTRODUCTION

In passing upon the applicant's representations as to the existence of emergency conditions, the Commission concluded that there was no basis for assuming

that, at the proposed prices, sale of these supplies of gas in interstate commerce would be required by the public convenience and necessity. Recognizing its primary obligation to protect consumers and to scrutinize prices,[9] the Commission found it necessary to condition temporary authorization upon a reduction in prices. This reduced price, it further specified, must be maintained for the duration of the temporary authorization, *i.e.*, while the matter of granting a permanent certificate and of attaching appropriate conditions to that authorization was undergoing hearing, consideration, and decision. It explained that maintenance of the specified price ceiling for the duration of the temporary authorization was required because the very collection of higher prices, even though they would be subject to refund, might have "an inflationary effect upon the prices charged and to be charged by others in the area," "irrevocably breach[ing] the price line or trigger[ing] price increases" (R. 71, 73).

The court below did not disagree with this finding. Indeed, it acknowledged that collection of the contract price, subject to refund "makes maintenance of price line something less than completely effective" (R. 333). Nevertheless, it struck down the condition on the ground that the Commission's power to maintain the price line was subordinate to a producer's right, which it found in the rate sections of the Gas Act, to put into effect the prices authorized by its private contract.

---

[9] See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*CATCO*).

We shall argue, first, that the court of appeals has drawn incorrect inferences as to the relationship of the rate and certification sections of the Act and that the Commission, whenever it exercises its powers of certification, may impose reasonable conditions upon the filing of rate changes. We urge, secondly, that even if such a restraint were impermissible in connection with the issuance of a permanent authorization, the Commission would be fully warranted in insisting upon the maintenance of the *status quo* during the period of a temporary authorization. In this aspect, it is crucial that the authorization is one granted the producer on the basis of his representations that he should be relieved of the onerous consequences of delay and without an opportunity for plenary consideration of the interests and objections of potentially adverse parties.

I

THE COMMISSION HAS THE POWER TO ISSUE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON CONDITION THAT THE INITIAL PRICE PRESCRIBED IN THE CONTRACT BE MAINTAINED FOR A SPECIFIED PERIOD

Section 7 of the Natural Gas Act requires a certificate of public convenience and necessity before a gas producer or a pipeline may perform services embraced by the Commission's regulatory authority. It also empowers the Commission to include in its certificate such reasonable terms and conditions as the public interest may require.

Section 4 requires a natural gas company to file any proposed changes in rates or service with the Commission, giving 30 days' advance notice. The

new rates are then subject to suspension for a maximum period of five months, pending investigation of their justness and reasonableness. At this point they may be put into effect if the administrative proceeding has not been concluded and an order entered by the Commission. When increased rates are thus made effective, the Commission, for its part, may require a bond or undertaking in order to assure refund of that portion of the rate ultimately found excessive.[10]

Stated broadly and in terms of the statute, the question in this case is whether the provision requiring natural gas companies to file proposed changes in rates and empowering the Commission to suspend and examine those rates (Section 4) implies that the Commission, in tendering a certificate pursuant to its powers under Section 7, is estopped from imposing a condition which will require the company to maintain its initial rates, as approved by the Commission, for a prescribed period without filing for an increase. More narrowly, the question is whether, at the least, such a condition may be imposed in issuing a temporary authorization, pending a hearing on the company's application for permanent authority.

Finding no significant distinction between temporary and permanent certificates for the purpose

[10] Section 5, broadly speaking, authorizes the Commission to institute a rate investigation of its own motion or upon complaint and to prescribe just and reasonable rates for the future. Since such an investigation does not originate with a suspension of rates, the Commission's ultimate order in a Section 5 proceeding entails no obligation to refund for past periods.

at hand, the court of appeals has held that in neither event may the Commission condition its grant of authority so as to preclude the filing of proposed rate increases which are contractually authorized. This, we believe, improperly subordinates the Commission's vital responsibilities under Section 7—responsibilities which have been delineated in this Court's prior opinions—to the producer's rights as declared by his private contract. In our view, the holding lacks sound basis in the statutory scheme and impairs the Commission's ability to pursue the principal statutory objective: to provide adequate protection to the ultimate consumer.

A. THE PUBLIC CONVENIENCE AND NECESSITY MAY NOT PERMIT THE COLLECTION OF PRICES AUTHORIZED BY A GAS SALES CONTRACT, EVEN ASSUMING THAT THEY ARE JUST AND REASONABLE BY REFERENCE TO THE COSTS OF THE PARTICULAR PRODUCER

This Court made it unmistakably clear in the *CATCO* case[11] that Sections 7 (c) and (e) of the Natural Gas Act, *infra*, pp. 43–45, impose upon the Commission the duty to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate commerce. The Commission can do this by denying a certificate for a sale which, for any reason (including price), is not required by the public convenience and necessity. Alternatively, it may authorize the sale subject to conditions. In following the latter course, the only limitation stated in the statute is that

[11] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

the Commission shall confine itself to "such reasonable terms and conditions as the public convenience and necessity may require." Even if a producer is so circumstanced that a high contract rate would be a "just and reasonable rate" (the language of Section 4) in terms of that particular company's costs, the Act contemplates that certification may be denied where "the public convenience and necessity" standard of Section 7 does not "require" that gas be supplied at such a price. It is obviously appropriate, in such a case, for the Commission to offer to certificate the sale at a price which *does* meet the public convenience and necessity. If the producer does not find the terms and conditions of this offer acceptable, he is not compelled to initiate the proposed service.[12] As this Court observed in *CATCO* (360 U.S. at 387), there is no irrevocable dedication of the gas until it commences to flow in interstate commerce.

While the standard of public convenience and necessity is not susceptible of precise definition, a central consideration is the proposed rate. *CATCO, supra.*[13] In the Court's words, the Commission is re-

---

[12] The fact that a natural gas company may, at the outset, refuse to render service except on its own terms does not, of course, require the Commission to approve service on those terms. As the Tenth Circuit stated in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 267 F. 2d 471, 472, affirmed, 364 U.S. 137, a contrary conclusion would mean that a natural gas company could dictate the terms and conditions of every certificate.

[13] See also, the following cases, decided subsequent to *CATCO*, which relate to the Commission's obligation to establish an initial "in-line" price: *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari

quired to give "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." *Id.*, 360 U.S. at 391. When an application "signals the existence of a situation that probably would not be in the public interest" a certificate should either not be issued or such conditions should be imposed as the Commission reasonably believes necessary to protect the public interest. *Ibid.* The Court also observed that a proposed price would not be in keeping with the public interest if that price were "out of line" or "might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise * * *." *Ibid.*

It is true, to be sure, that the specific condition discussed by the Court in *CATCO* would have permitted the collection of the contract price, subject to refund, after a suspension of only one day.[14] Con-

---

denied, *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[14] This was the form of condition which the Commission had originally sought to impose but which it had abandoned in the order under review.

trary to the suggestion below, however (R. 332), there is nothing in the *CATCO* decision narrowly limiting the Commission to the imposition of this particular type of condition or suggesting that it should be adopted in circumstances where it would prove ineffective." The essential point is that the Commission's conditioning power should be used to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," since the "overriding intent of the Congress [is] to give full protective coverage to the consumer as to price * * *." 360 U.S. at 388–389.

The Commission's experience since 1959, when *CATCO* was decided by this Court, has demonstrated that the particular type of condition originally offered to the *CATCO* producers may, in some circumstances, be quite inadequate for the purpose in view. Thus, it is apparent that the triggering of price rises, to which this Court pointedly referred, may result from the very collection of out-of-line prices by a producer, even though all amounts later determined to be excessive are subject to refund. See *Pure Oil Co.*, 25 FPC 383, 389–390, affirmed, 299 F. 2d 370 (C.A. 7); *Gulf Oil Corp.*, 23 FPC 664, 666–667.[16] As the Commission

[15] In *CATCO* that condition was not challenged by the consumer groups when it was originally imposed.

[16] In the latter case, the Commission said 23 FPC at 666–667: "The examiner's decision provided that the producers would be allowed to collect the original contract rate subject to refund one day after service commenced at the conditioned initial rate. Such a provision would deprive the initial price condition of much of its effect. If the line established by the initial price is abandoned within a day, the market probably

explained in this case (R. 146-148), these effects are often irreversible; even though the particular triggering price may ultimately be restored to the prior level and intervening collections above that level refunded, the higher level may continue to prevail, indefinitely or for protracted periods, under other producers' contracts which have been triggered.

In this connection, we note that intrastate sales contracts tend to follow the terms of interstate sales (see, *e.g.*, *Cities Service Gas Company*, 14 FPC 134, 145-148, affirmed *sub nom. Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923), but with no assurance that high rates under intrastate contracts will be suspended, refunded, or even conformed to later readjustments in interstate rate levels. Thus, rates collected by producers for sales under the Commission's

---

will establish a new high price at the effective contract price of twenty cents. Our experience has shown that although this new high price is conditional and is being collected subject to refund, that it tends to set a new price plateau. Other new contracts in the area almost inevitably are entered into at this price. The prices in old contracts containing favored nation clauses and price redetermination clauses based on the highest prices being paid in the area escalate to this new price. Thus, although all of these prices may be suspended or otherwise made subject to refund by the Commission, the inevitable result of permitting a new high rate to become effective is that the new price tends to become the prevailing price. Furthermore, since such a price will be subject to refund, it will only increase the uncertainty of prices in the gas industry. In our judgment, the purposes for which initial rate conditions were intended can best be achieved by holding the line at a rate which is comparable to that allowed other producers in similar circumstances but which is not subject to immediate change."

jurisdiction, even though subject to refund, tend to set a level of non-jurisdictional intrastate rates; these in turn may generate reciprocal pressures on the jurisdictional rates. Certainly, *CATCO* suggests that the Commission should exercise its Section 7 authority to avoid the likelihood of such a chain reaction. *Cf., Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24-27; *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 240 (C.A. 2), certiorari denied, 320 U.S. 751.

Moreover, even if all of the triggered rates, interstate and intrastate, were subject to refund, there would remain the serious detriment attendant upon the collection of excessive charges. As this Court recognized only last term in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154, the possibility of refund does not afford full protection to the consumer:

> * * * True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory * * *. It is, therefore, the duty of the Commission to look at "the backdrop of the practical consequences [resulting] * * * and the purpose of the Act," *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U.S. 137, 147 (1960), in exercising its discretion under § 16 to issue interim orders * * *.

The Commission's duty under Section 7 requires it, of course, to consider all of the terms and conditions affecting the proposed sale—not merely the initial price. See *Superior Oil Co.* v. *Federal Power*

Commission, 322 F. 2d 601, 617 (C.A. 9). This, also, may disclose the need for a continuing ceiling on the filing of increased rates. To illustrate, let us assume that in a given producing area the Commission has been unconditionally certificating sales pursuant to contracts uniformly calling for an initial price of 18 cents, with no provision for any type of price escalation for five years. At the same time, we will suppose, it has denied certificates where the proposed initial price was 19 cents—on the grounds that 19 cents was out of line; that collection of the 19-cent rate, even subject to refund, would trigger price increases; and that there was no showing of need for gas on more expensive terms. It would seem apparent that a sales contract calling for an 18-cent price for the first thirty days of delivery, with an escalation to 19 cents thereafter, would be objectionable for substantially the same reasons.

Indeed, in the circumstances posed, a contract calling for increases within one or two years (or, perhaps, any period less than the five-year escalation period uniformly called for in the other producer contracts) might well be denied certification on the obvious ground that the sale was unnecessary from the standpoint of providing the public an adequate and economical supply of gas. If the Commission, as seems beyond question, could deny the application outright in such a case, it would seem strange to conclude that it may not take a lesser step—namely, offer certification conditioned upon the elimination of these fea-

tures of the contract which stand in the way of a finding of public conveniences and necessity."

---

[17] For a recent example of a matter involving limitations upon future filings imposed in connection with the issuance of a permanent certificate, see *Placid Oil Co.*, Docket Nos. G-13183, *et al.*, 49 P.U.R. 3d 332, pending on review *sub nom. Callery Properties, Inc., et al.*, C.A. 5, Nos. 20872, *et al.* In those cases, some of which involved the same sales involved in this Court's remand in *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195, the initial prices were in general 23.55 cents, with a 2-cent escalation in July 1962. The Commission found that the in-line price was 20 cents for on-shore properties. However, it also found that collection of prices above 23.55 cents, the amount that was being collected during the pendency of the proceedings, would contractually trigger South Louisiana price increases. Accordingly, the Commission conditioned the permanent certificates which it issued there not only upon reduction of the initial price to 20 cents but also upon not filing any increased rate of more than 23.55 cents, pending the final decision in the area rate proceeding, Docket No. AR61-2, or July 1, 1967, whichever is earlier.

See, also, *Trunkline Gas Co.*, 21 FPC 704, petition for review dismissed, *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 284 F. 2d 200 (C.A.D.C.). There the Commission, in certificating a higher initial price than any previously approved, explained (21 FPC 719): "* * * these contracts provide for a firm 20 cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the usual provisions for escalations and redeterminations found in most contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20 cent price is required by the public convenience and necessity; and, it will not be sufficient for producers hereafter seeking certificates to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price. We shall

B. THE LEGISLATIVE HISTORY OF SECTION 7 CLEARLY SHOWS THAT THE COMMISSION MAY IMPOSE CERTIFICATE CONDITIONS INCONSISTENT WITH THE UNDERLYING CONTRACT WHERE NECESSARY TO PROTECT THE PUBLIC INTEREST

The present provisions of Section 7 (c) and (e) were added in 1942, four years after the passage of the Natural Gas Act. The addition of the broad certificate requirement contained in these sections was intended to strengthen and make more effective the Commission's regulation, which was then generally limited to the control of rates pursuant to Sections 4 and 5 of the Act.

As originally enacted, the Gas Act subjected any company rendering a jurisdictional service to Commission regulation of rates and charges. In addition, it was provided that, once service had been initiated, jurisdictional facilities or services could be abandoned only with Commission approval pursuant to Section 7(b). The power of the Commission to

---

closely scrutinize any such proposed sales in this area under contracts which provide for price escalations or redeterminations above 20 cents per Mcf within a period of five years, and in the absence of a clear showing that such prices are required by the public convenience and necessity, we shall either deny the applications or impose price conditions."

In a subsequent proceeding, where the contracts called for an initial price of 20 cents and escalation of 2 cents every four years, the Commission issued the certificate upon the condition that the price structure should be modified to conform to that approved in the *Trunkline* case, *i.e.*, that there would be a firm 20-cent price for 10 years. *Peoples Gulf Coast Natural Gas Pipeline Co.*, 24 FPC 1, certificate vacated by order of November 2, 1961, *Hassie Hunt Trust, et al.*, 26 FPC 680. The vacating order is now pending on petitions for review in the Fifth Circuit, see *supra*, p. 4.

control initiation of service was then confined to situations in which a company sought to enter a market already being served by another natural gas company.[18] Since most of the expansion during the period the 1938 provisions remained in effect was directed to development of new markets, rather than service to markets already served, this meant that, in most instances, the Commission had no control over the initiation of service by natural gas companies, over investment in the facilities required to render those services, or over the initial rate structures.[19]

In 1942, Congress undertook to close this gap in the regulatory scheme. Section 7(c) was changed so as to require certificates of public convenience and necessity for all jurisdictional services and for the construction, extension or acquisition of facilities, the use of which would be subject to Commission regulation. Congress also added Section 7(e), which prescribes the standards to be applied by the Commission

---

[18] In determining whether a certificate of public convenience and necessity should be granted to enter a competitive market, the Commission was required to "* * * give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce * * * at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." [52 Stat. 825]

[19] Prior to the amendment of the Act in 1942, only 16 certificate applications were received by the Commission. The majority were dismissed for lack of jurisdiction and only four certificates were issued. See Federal Power Commission, *The First Five Years Under the Natural Gas Act* (1944), p. 3.

in deciding whether a proposed act or service should be authorized and specifically provides that:

> * * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3):

> * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand.* * * * [Emphasis supplied.]

The Senate Committee on Interstate Commerce made a similar explanation (S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1–2):

> Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The

> present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. *The characteristics of their rate structure could be studied.* * * * [Emphasis supplied.]

See, also, Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 5–6.

In short, Congress expected the Commission to consider and, if necessary, modify a gas company's rates or matters affecting them in the process of deciding whether and on what terms a certificate should be issued. The Commission has long recognized this obligation and, in addition to imposing conditions with respect to initial prices, has frequently found it necessary to require modification of other tariff or contract provisions as a condition to granting certificates of public convenience and necessity. *E.g., Florida Economic Advisory Council* v. *Federal Power Commission,* 251 F. 2d 643, 646, 648 (C.A. D.C.), certiorari denied, 356 U.S. 959, affirming *Houston Texas Gas and Oil Corp.,* 16 FPC 118, and 17 FPC 303 (condition requiring elimination of cancellation provisions in transportation agreement); *Northern Natural Gas Co.,* 22 FPC 164, 174–175, 180, affirmed *sub nom. Minneapolis Gas Company* v. *Federal Power Commission,* 278 F. 2d 870 (C.A.D.C.) certiorari denied, 364 U.S. 891 (certificate conditioned upon removal of clauses permitting cancellation depending on price relationship of gas and competitive fuels in gas purchase contracts upon which feasibility

of pipeline project depended); *Transwestern Pipeline Co.*, 22 FPC 391, 394–395, modified on rehearing, 22 FPC 542 (minimum bill provisions of proposed tariff required to be modified); *Panhandle Eastern Pipe Line Co.*, 10 FPC 185[20] (conditions requiring inclusion of interruptible rate schedules in tariffs). *Trans-Continental Gas Pipe Line Co.*, 7 FPC 24, 38–40 (commencement of service conditioned upon filing of new tariff satisfactory to Commission because of disapproval of certain terms of service); *Alabama-Tennessee Natural Gas Co.*, 7 FPC 257[21] (commencement of service conditioned upon filing of tariff satisfactory to Commission). The alternative to imposition of appropriate conditions, *i.e.*, outright denial of a certificate, has also been employed by the Commission to prevent an inferior "end use" of gas and possible future inflation of field prices by sales not in themselves subject to the Commission's regulation. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23–25.[22]

---

[20] See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where a collateral attack on this condition was rejected by the Court.

[21] Discussed and implemented in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (C.A. 3).

[22] Even prior to the 1942 amendments to Section 7 (which for the first time in express and specific terms gave the Commission conditioning power) the Commission imposed a condition which provided that the "certificate shall be cancellable if applicant increases or proposes to increase the rate to the consumers proposed to be served above ten (10) cents per M.c.f." *Louisiana-Nevada Transit Co.*, 2 FPC 546, 549, affirmed *sub nom. Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (C.A. 5).

C. THIS COURT'S DECISION IN "MOBILE" DOES NOT SUPPORT THE RESULT REACHED BELOW

If, as the court below held, the Commission's power to condition certificates must yield to an uncontrollable "right" in a producer to file rate changes under Section 4 and to put those changes into effect, the agency's ability to realize the objectives delineated in *CATCO* is substantially impaired. Indeed, if the teaching of *CATCO* is to prove meaningful, Section 4(d) must continue to be treated as it was in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332—not as an affirmative grant of power to natural gas companies, but as a restrictive regulatory provision imposing notice and filing obligations on such companies as a condition of putting into effect their *otherwise authorized* rate changes. As the Third Circuit stated[33] in dealing with a pipeline's effort to escape a rate condition imposed in its certificate by filing a change pursuant to Section 4(d):

> * * * What Section 4(d) provides is an alternative method of effecting changes otherwise permissible by virtue of the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation* (*Federal Power Commission* v. *Mobile Gas Service Corp.*), 1956, 350 U.S. 332 * * * [34].

The reliance of the court below on *Mobile* as supporting its view that the Commission's Section 7 pow-

---

[33] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 473 (C.A. 3), certiorari denied, 352 U.S. 891.

[34] This opinion was written by Judge McLaughlin who had also authored the opinion affirmed by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

ers are subordinate to the contracting powers of the companies is wholly misplaced. In *Mobile*, although the pipeline had agreed to sell gas for resale to an industrial user at a fixed price for a period of ten years, it filed an increased rate pursuant to Section 4(d) without any consent from its customer. This Court, pointing out that passage of the Natural Gas Act had not abrogated contracts but, instead, had superimposed a regulatory scheme, concluded that Section 4 did not create a right to file increased rates inconsistent with contractual obligations (350 U.S. at 339):

> * * * § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4(c) purports to define what constitutes a "contract" that may be filed with the Commission. The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made.* * * [Emphasis in original.]

The Court added that "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest" (350 U.S. at 344). See, also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353. In short, the holding in *Mobile* that the provisions of Section 4 of the Act did not nullify contractual limitations on price increases cannot be converted into a determination that the Commission's broad certificat-

ing authority under Section 7 is circumscribed by contractual provisions authorizing rate increases."

That *Mobile* was concerned with a utility's unilateral efforts to take measures opposed to its customer's interests and that it nowise derogates from the scope of the Commission's powers is a proposition confirmed by the companion *Sierra* case, *supra*, decided the same day. There the Court, construing the similar provisions of the Federal Power Act,[35] declared that the Commission could relieve the seller of contractual obligations inhibiting a price rise if, but only if, it could be demonstrated that the public

---

[34] Compare the analysis of *Mobile* by Judge Soper for the Fourth Circuit in *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F. 2d 755, 761–762, certiorari denied, 356 U.S. 912: "It was held [in *Mobile*] that this [rate change filing] procedure precludes a producer from changing contracts unilaterally to serve its own private interest, but affords an avenue of relief when the interest of the producer coincides with the public interest. In such case the utility [*i.e.*, the producer] has the right to complain and ask the Commission to investigate the rate, and if it finds after hearing that the contract rate is so low as to conflict with the public interest, it has authority to increase the rate."

After discussing *Sierra*, Judge Soper concluded: "The practical effect of the decision is to compel contracting utilities to abide by their agreements unless it is shown that the agreed rate is so low 'as to impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discrimnatory.' These quoted clauses form the cornerstone of the utilities argument, but it is plain that they are directed to rates too *low* to be ordnarily imposed." (Emphasis in original.)

[35] Sections 205 and 206(a), 16 U.S.C. 824d and 824e(a).

interest required such action, *i.e.*, if it were shown that the rate yielded a return "so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory" (350 U.S. at 355). The Court went on to explain (*id.*):

> * * * That the purpose of the power given the Commission by § 206(a) [the Power Act equivalent to Section 5(a) of the Natural Gas Act] is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

The reliance (R. 332–333) by the court below on language in *Mobile* stating that the function of the Commission is to review rates but not to fix them in the first place is also misplaced. Even in proceedings pursuant to Section 4 or 5 of the Act—the type of proceedings to which the comment was directed—the Commission, as part of its function in reviewing rates, may fix substitute rates itself if the company-filed rates are not shown to be lawful. Indeed, Section 5 expressly states that the Commission "shall fix" just and reasonable rates in such circumstances. Similarly, in imposing conditions with respect to rates and contracts in a Section 7 certificate proceeding the

Commission is merely reviewing proposed rates initially fixed by the company, by contract or otherwise, in order to determine whether the contractual rate structure meets the statutory test for certification.

II

THE ISSUANCE OF TEMPORARY AUTHORIZATIONS UPON CONDITION THAT NO INCREASED RATE BE FILED PENDING FINAL CERTIFICATE ACTION IS REASONABLE IRRESPECTIVE OF THE SCOPE OF THE COMMISSION'S POWER TO CONDITION PERMANENT CERTIFICATES

The court below treated permanent certificates and temporary authorizations alike for the purpose of testing the validity of the condition here at issue. We believe that there are significant differences and that all of these differences make the Commission's case even stronger when the condition is one annexed to a temporary authorization.

Under Section 7(c), the Commission "may issue a temporary certificate in cases of emergency. * * *." This language of discretion imports considerable latitude as to whether such an authorization should be granted and, by the same token, great freedom to determine when or upon what conditions it will be issued. In contrast, Section 7(e), although it explicitly confers the power to attach appropriate conditions to a grant of permanent authority, provides that a certificate "shall be issued" in any case in which the applicant has made the requisite showing of public convenience and necessity.

There is another important consideration. A permanent certificate is issued only after the Com-

mission has determined, following notice to interested parties and a hearing, that the applicant is qualified to render the service; that he is prepared to conform to the requirements of the Act and the Commission's regulations; that there is a public need for the service; and that the price is not out of line. The mandatory requirement of a hearing[27] guards against improvident grants. Among other things, it furnishes assurance that the interests of consumer groups will be heard and considered before the Commission approves any sale at an initial price which they may deem objectionable. The summary character of a grant of temporary authority, which is characteristically made without a hearing, makes it all the more incumbent upon the Commission to adopt measures which will guard against any untoward consequences. As we have already shown in Point I, *supra*, pp. 19–23, the collection of an excessive rate may have such consequences quite apart from the inadequacy of imposing an obligation to make refunds. The damage may be done even before the hearing on the application for permanent authority is held.

The underlying purpose in according the Commission the power to grant temporary authorizations is itself suggestive. In adopting the broader certification provisions of Section 7 in 1942, Congress recognized that this hearing process, particularly where there is a serious challenge to grant of the applica-

---

[27] Compare, *e.g.*, Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. (Supp. IV) 309, which does not make a hearing a necessary prerequisite to the grant of a license.

tion, will inevitably take time and that there will be emergency situations where a seller would suffer irreparable harm if he could not commence operation upon some basis while the proceeding to determine the exact terms of service was in process. Accordingly, it provided that the Commission, in its discretion, could issue temporary certificates without notice or hearing pending the determination of the application for permanent certificates. The need for such temporary authorizations in the producer field is particularly acute; gas which cannot be sold must often be flared, *i.e.*, permitted to escape from the well and burned off. In other instances, gas which is not sold will be drained off by adjacent wells from which sales are authorized. And many producers, as lessees, will be contractually obligated to pay so-called "shut-in royalties" to the landowner if they cannot sell their gas, thus increasing the operating costs usually passed on to the consumer. To deal with these various situations, the Commission, by Section 157.28 of its Regulations, *infra*, pp. 45–46, has prescribed the conditions which it will consider to be emergencies warranting the issuance of temporary authorizations.[28]

---

[28] In the notice proposing its regulations relating to temporary authorizations for producers, the Commission explained the need for the regulations as follows (21 Fed. Reg. 4833, June 29, 1956): "The Commission's experience has indicated the advisability of making possible the earlier initiation of sales or transportation of natural gas in cases where even the normal regulatory lag in the processing of applications for temporary authorization may result in losses to the applicant arising, among other things, from drainage of property by

As already indicated, this means that temporary authority is normally granted without notice or hearing, upon a producer's *ex parte* showing that he is faced with serious hardship. There is accordingly no record basis at this stage for determining whether the proposed price is in line within the meaning of the *CATCO* decision. To provide protection during the pendency of the application for permanent authority, the Commission has adopted a uniform policy of fixing certain ceiling or guideline prices which it will not breach in authorizing new sales. These guidelines have been established for each production area as part of the agency's interim program to hold the price line pending establishment of just and reasonable area prices. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294. This price, of course, is a tentative one—it is subject to modification upon disposition of the application for permanent authority—but it represents the Commission's con-

---

adjoining wells, possible loss of lease from non-production, economic hardship resulting from payment of shut-in royalties or lack of income or the excessive flaring of gas. The Commission is of the opinion that the public interest in sound regulatory processes neither requires nor justifies that these economic burdens be borne by the producing segment of the natural-gas industry."

The Commission has recently instituted new procedures under which uncontested producer applications can be processed through final grant within five to seven weeks of filing. See FPC Press Release No. 12733, dated June 17, 1963. In view of this development it has refrained from issuing temporary authorizations in cases appearing to present no issue warranting a formal contested hearing, unless the emergency condition prevailing is of a particularly acute nature, as is the case with flaring or imminent threat of loss of lease.

sidered and expert judgment as to a price which will reasonably safeguard the interests of the consumer while permitting the producer to avoid the harsh and wasteful consequences of delay.

We question whether, even in the absence of an express prohibition, the holder of such an emergency authorization would have the right to alter the initial price set forth in the instrument approving the interim operation. We stress that the applicant for a "temporary" has not submitted his credentials to the test of an adversary proceeding. He has merely invoked the Commission's discretion to permit him to go forward *pendente lite.*[29] It stands to reason that he may not be permitted, during that period, to alter unilaterally the terms which the Commission took into account in exercising its discretion in his favor.

This, indeed, is the plain teaching of the Third Circuit's decision in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494. There, the Commission, after a hearing, granted a certificate of public convenience and necessity to a new pipeline. Concluding, however, that it lacked adequate experience to enable it to fix immediately a proper initial rate for the company, the Commis-

[29] In contrast, Section 7(e) provides that the Commission "shall" issue a permanent certificate to an applicant who, after the prescribed hearing, meets the statutory tests set forth in the Section. Since such a person holds his certificate as of right it would follow that, in the absence of an express certificate condition to the contrary, he has the right to increase his price subject only to the inhibitions of Section 4.

sion conditioned the certificate upon the pipeline's subsequent filing of a satisfactory tariff. Meanwhile, operations were allowed to go forward at a specified "interim" rate. No express condition against any increase in this interim rate was inserted in the certificate. Prior to the Commission's approval of a satisfactory tariff, the company filed an increase in the interim rate in purported reliance on Section 4(d). Upholding the Commission's authority to reject this filing, the Third Circuit, speaking through Judge Hastie, ruled that Section 7 was controlling (203 F. 2d at 497):

> * * * To treat the "interim rate" permitted under the June 16, 1950 order [permitting operation at that rate] as the kind of rate which is subject to change on the free initiative of the Company under Section 4(d) is to ignore the restrictive context in which it was allowed to become effective. For it is our premise that the Commission had power to impose the rate condition * * *. Only after such an initial determination of a satisfactory rate in compliance with the June 16, 1950 order, could the Company properly claim that it was operating under the kind of tariff that is subject to change by Section 4(d) procedure.

Here, the case is even clearer. The temporary authorization carried an express prohibition forbidding a change in the rate.

Finally, we submit that where a producer has been expressly put on notice, it cannot avail itself of the benefits of the authorization and commence service which the Commission might never have authorized

unconditionally, while reserving to itself "a right" to ignore a controlling condition. To paraphrase this Court's holding in *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513, "having invoked the power of the Commission [to confer the benefit], it is now estopped to deny the Commission's power to issue the certificate in its present form * * *."**

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

PETER H. SCHIFF,
Attorney,
Federal Power Commission.

DECEMBER 1963.

** The court below finds similarity between permanent and temporary authorization because the producer in either instance dedicates his gas to interstate commerce once he commences service. But the producer is under no obligation to begin service under a temporary authorization which he finds unacceptable or wishes to challenge. Nor can he, by commencing service, frustrate the exercise of the Commission's responsibility under Section 7 to make a full investigation of proposed rates which may adversely affect the price structure.

APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the clas-

sifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time

when it would otherwise go into effect;[1] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * *

SEC. 7 * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without

[1] Subsection 4(e) was amended May 21, 1962, by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c)[3] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance

[3] Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)].[3]

* * * * *

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the

---

[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938)).

[4] See footnote 2.

whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

2. The Commission's Regulations Under the Natural Gas Act, 18 C.F.R., Subchapter E, as amended, provide in pertinent part:

Sec. 157.28. Temporary authorizations.

Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however,* That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown. [Cum. Supp. 1963.]

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportion is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

U.S. GOVERNMENT PRINTING OFFICE: 1963

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission, unless otherwise ordered for good cause shown. [Cum. Supp. 1963.]

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

ROBERT W. HENDERSON
THOMAS G. CROUCH
700 Mercantile Bank Building
Dallas, Texas 75201

ROBERT E. MAY
RICHARD F. GENERELLY
JOHN T. KETCHAM
May, Shannon and Morley
1700 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondents, H. L. Hunt, et al.

January 29, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 323-337) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings were entered on July 19, 1962 (R. 338-344). A petition for rehearing filed by the Commission on August 23, 1962, was denied on April 16,

1963 (R. 344). The petition for writ of certiorari was filed on July 15, 1963, and granted on October 14, 1963 (R. 345; 375 U.S. 810). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that, while the Commission could condition its authorization of a sale of natural gas by an independent producer under Section 7 of the Natural Gas Act upon a specific reduction in the proposed initial price, the Commission could not properly condition such authorization to preclude the producer from seeking a determination of the justness and reasonableness of his initial contract price by the filing of a rate increase application under Section 4(d) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, and the Commission's Regulations under the Natural Gas Act, 18 C.F.R., Subchapter E, are set out in the Appendix, *infra*, pp. 33-44.

STATEMENT

Respondents are independent producers of natural gas and, as such, their sales of gas for resale in interstate commerce are subject to regulation under the Natural Gas Act by the Federal Power Commission. The cases below arose on petitions filed by Respondents to review orders of the Commission granting Respondents temporary certificate authorization under

Section 7(c) of the Act for seven new sales of gas.[1] The orders complained of required, as a condition of sales authorization, that Respondents reduce their proposed initial price to the pipeline purchaser and, further, that they forego, pending further order of the Commission, the right to seek their contract prices under the rate changing procedures of Section 4(d) of the Act. Respondents sought review of both conditions as well as the Commission's action in rejecting rate filings which, had they been accepted, would have allowed Respondents to collect, subject to refund and after a statutory period of suspension, their initial contract prices pending a determination of the justness and reasonableness of those prices under the rate review provisions of the Act.

On review, Respondents contended that no reason existed for the first condition requiring a lowering of the initial price at which their gas would be permitted to enter the market. Respondents and other producers were then selling substantial quantities of gas to the same pipeline purchaser and to another pipeline from the same fields and, indeed, from the same wells and reservoirs, under permanent certificates issued by the

---

[1] The seven sales were proposed to be made, and are now being made, from the Alvin City and Chenango Fields in Brazoria County, Texas (R. 11, 157), and from the Alta Loma Area of Galveston County, Texas (R. 83). All three fields are within Texas Railroad Commission District No. 3 and, as the court below indicated (R. 324), the sale by Hassie Hunt Trust to Natural Gas Pipeline Company of America from the Alta Loma Area may be considered as typical of the rest. This sale is made pursuant to a Gas Sales Contract dated December 15, 1960 (R. 85), and is the subject of Commission Docket No. CI61-1283. To date, none of the seven sales has been permanently certificated by the Commission, and Respondents continue to sell their gas under temporary authorization subject to the conditions complained of below.

Commission at an approved initial contract price of 20 cents per Mcf (R. 12, 80-81, 84, 96-101). The proposed new sales for which they sought certificate authorization represented, in effect, no more than a dedication of additional gas reserves to the same purchaser in the same fields at the same price, namely, 20 cents per Mcf at a pressure base of 14.65 psia. Since their initial contract price was in line with and no higher than other prices in the area, thereby eliminating the possibility of a general price rise through the triggering of "favored nation" clauses in other contracts, Respondents argued that the requirement that they lower their initial price from 20 cents to 18 cents per Mcf was without rational basis and therefore unreasonable.[2]

As to the second condition requiring that the 18-cent price be maintained in effect "for the duration of the temporary authorization and until a different prospective rate is established" (R. 114), Respondents called attention to the fact that Section 7(c) of the Act, while providing for a hearing on applications for permanent certificates of public convenience and necessity, makes no provision for when that hearing shall be held.[3] Under the circumstances, Respondents argued that a producer, who begins and is forced under the Act to continue his sale under the twofold disability of a re-

---

[2] Respondents pointed out that they would in fact receive less than 20 cents per Mcf from the sales involved since they bear the cost of gathering and delivering the gas at a central delivery point in the field. Another pipeline purchasing gas from the same wells, but from other producers, bears the entire cost of gathering (R. 175, 191, 260).

[3] Compare Section 4(e) of the Act, which provides that the Commission shall give preference to rate matters "over other questions pending before it and decide the same as speedily as possible."

duced initial price and a condition prohibiting any increase in that price, might materially deplete or even exhaust his gas reserve without ever being afforded the opportunity of justifying his initial contract price under either Section 7 or Section 4 of the Act.

The Commission defended the first condition requiring a 2-cent reduction in the initial price on two grounds. First, the initial price of 20 cents per Mcf called for by the contracts exceeded the guideline price of 18 cents per Mcf which the Commission had established for new sales of gas in Texas Railroad Commission District No. 3 on September 28, 1960, in its Statement of General Policy No. 61-1, 18 C.F.R. § 2.56, 24 F.P.C. 818. Secondly, assuming that all future price escalations under the contracts were approved as being just and reasonable, the weighted average price of the gas which Respondents proposed to sell over a 20-year term would be higher than any previously certificated without price condition in the area (R. 144-145, 325).[4] With respect to its second condition imposing a moratorium on rate filings, the Commission relied on the letter addressed to Respondents on November 2, 1961 (R. 144), in which it stated:

> "* * * The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See, *e.g.*, *Atlantic Refining Co.* v. *Public*

[4] This was not true, however, with respect to Respondents' sales from the Chenango Field, which were in complete conformity with other permanently certificated sales in the area (R. 324).

Service Commission, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases * * *" (R. 147-148).

The court of appeals based its decision on this Court's decisions in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 ("*Catco*"), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 ("*Mobile*"). While upholding as reasonable and proper the requirement that Respondents reduce their initial price, the court held that the Commission had exceeded its statutory authority in requiring that Respondents relinquish the right to make rate filings under Section 4(d) of the Act once their sales had begun.

Rejecting the Commission's contention that a limitation on the filing of rate changes was required by the temporary and *ex parte* nature of the authorization granted Respondents, the court found that Respondents had subjected themselves fully to all of the duties and obligations of natural gas companies when they dedicated their gas to the interstate market. This being so, the court held that the Commission could not lawfully take from Respondents rights and safeguards accorded natural gas companies by the Act as a part of the duties imposed. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to Respondents by Congress, namely, the right to make and change their rates in the manner prescribed by Section 4(d) of the Act.

SUMMARY OF ARGUMENT

I.

The court of appeals held that the Commission may, in the reasonable and proper exercise of its conditioning power under Section 7 of the Natural Gas Act, condition its authorization of sales of gas by independent producers upon a specific reduction in the initial price at which their gas will be permitted to enter the market. The court found, however, that the Commission exceeded its statutory authority when it sought to condition its grant of temporary sales authorization to require that producers give up the right to change their rates in accordance with Section 4(d) of the Act once their sales had begun. Rejecting the argument that a limitation on the filing of rate changes was required due to the *ex parte* nature of the authorization granted, the court found that producers subject themselves fully to all of the duties and obligations of natural gas companies under the Act when they dedicate their gas to the interstate market. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to natural gas companies by Congress as a part of the duties imposed, namely, the right to make and change their rates in the manner prescribed by Section 4 of the Act.

While Section 7(e) of the Act provides that the Commission may attach conditions to the certificates of public convenience and necessity which it issues, the Commission's power in this respect is not absolute. The conditions imposed must be in accord with the other provisions of the statute and must meet the test of constitutional due process. In holding that a prohibition of rate filings under Section 4(d) was unreasonable

and therefore unlawful, the court below did not suggest that the Commission's duties and responsibilities to protect the public interest under Section 7 were in any way subordinate or subservient to the rights reserved to producers under Section 4. Rather, the clear import of the court's holding was that the Commission, in seeking to fulfill the aims of the Act through the use of its conditioning power under Section 7, must do so in a manner which is not inconsistent with other provisions of the Act.

We believe that the decision below was in complete accord with the statutory scheme of regulation contemplated by Congress when it passed the Natural Gas Act. The court's holding is fully supported, moreover, by this Court's decisions in *Atlantic Refining Co.* v. *Federal Power Commission*, 360 U.S. 378 ("*Catco*"), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 ("*Mobile*").

In *Catco*, the Commission was admonished either to deny a certificate to the producer where the initial price appeared out of line or to so condition its grant of sales authorization as to reduce the price at which the gas would be allowed to enter the market. Citing its decision in *Mobile*, the Court held that this would not encroach on the initial rate-making power reserved to the producer but would merely serve to protect the consuming public while the justness and reasonableness of the price fixed by the parties was being determined under other sections of the Act. In so holding, the Court specifically recognized the right of the producer, once he had begun his sale, to collect his initial contract price subject to refund under Section 4(e) and found, moreover, that this would afford the consumer protection not otherwise available under Sec-

tion 5, where refunds could not be ordered. By thus giving effect to both Section 7 and Section 4, the public would be protected while preserving the remedy of the producer to protect himself from unreasonable rates.

II.

The Commission's contention that it must have the authority to declare a moratorium on rate increase filings by producers under Section 4(d) pending permanent certification or a subsequent determination of just and reasonable area rates is largely an argument of administrative convenience. Such a moratorium or rate "freeze", irrespective of its duration, is in basic conflict with the regulatory scheme of the Act.

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to consumers of gas. That this purpose was to be accomplished under an act which did not envisage a price or rate freeze was made clear in *Bowles* v. *Willingham*, 321 U.S. 503, when the Court observed that, in contrast to a price freeze statute, the Natural Gas Act provides a scheme for fixing rates which are just and reasonable to particular persons and companies. The Court has subsequently affirmed that rates fixed by the Commission must be just and reasonable both to consumers and to natural gas companies, *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 310.

If, as the Court has indicated, a producer is entitled to a just and reasonable rate, it is imperative that he be permitted to change his rates in accordance with his contract under Section 4 of the Act; otherwise, he will run the risk of being forced to sell his gas at a confiscatory rate.

ARGUMENT

Introduction

This case starts, as the court below observed, with the recognition that the Commission has the power to impose reasonable terms and conditions on its grant of temporary and permanent certificate authority under Section 7 of the Natural Gas Act. Taking its text from this Court's decision in *Catco*,[5] the court of appeals found that "the necessity for conditioning a grant of a certificate is to fulfill the aims of the Act by an accommodation of all of its demands" (R. 332). Accordingly, while upholding as reasonable the Commission's requirement that Respondents reduce their initial price as a condition of beginning their sales, the court held that the Commission might not thereafter, under the guise of a certificate condition, deprive Respondents of rights accorded natural gas companies by Congress as a part of the duties imposed. Specifically, the court held that the Commission had exceeded the limits of its statutory authority under Section 7 in requiring that Respondents relinquish the right to seek their initial contract prices under Section 4(d) of the Act once their sales had begun at the lower prescribed rate.

The Commission attacks the holding below on two grounds. First, it contends that the court of appeals has misconstrued the relationship of the rate and certificate provisions of the Act in that it would subordinate the Commission's powers and responsibilities under Section 7 to the rights of a producer as declared by his contract, thereby rendering the standard of

[5] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

"public convenience and necessity" subservient to the rate standard of "just and reasonable." Secondly, the Commission contends that its authority to impose reasonable certificate conditions under Section 7 must necessarily include the power to forestall and prevent the collection of higher rates by producers subject to refund under Section 4(e) pending the determination of just and reasonable producer rates in Section 5 area proceedings. Otherwise, the Commission argues, it will be unable to carry out the intent of Congress to protect the consumer from unreasonable rates and charges and, at the same time, hold the price line as it was enjoined to do by the Court in *Catco*.

In answer to these arguments, we will show that the court of appeals has correctly interpreted the relationship between the rate and certificate sections of the Act and that its interpretation in this case was in accord with and fully supported by this Court's decisions in *Catco* and other cases. We will further show that the Commission's proposed moratorium on rate change filings by producers cannot be justified as a temporary expedient pending the fixing of just and reasonable area rates under Section 5 of the Act since the concept of a rate "freeze" is in basic conflict with the regulatory scheme envisaged by Congress.

I.

THE AUTHORITY OF THE COMMISSION TO ATTACH REASONABLE CONDITIONS TO CERTIFICATES UNDER SECTION 7 OF THE ACT DOES NOT INCLUDE THE POWER TO NULLIFY RIGHTS AND SAFEGUARDS RESERVED TO NATURAL GAS COMPANIES BY CONGRESS UNDER SECTION 4 OF THE ACT

Section 7(e) of the Act provides that the Commission may attach conditions to the certificates of public convenience and necessity which it issues. It is clear, however, that the Commission's power to impose such conditions is not absolute. The conditions must be reasonable and have a rational basis in terms of the public convenience and necessity. Moreover, on the question of attaching conditions to temporary certificates issued to independent producers, the Tenth Circuit has delineated the scope of the Commission's power in the following language:

> "It does not follow that the broad power granted the Commission to summarily act upon applications for temporary certificates is an absolute power. If the Commission deems it in the public interest to accept an application conditionally such conditional acceptance *must be in accord with the provisions of the Act* and must meet the test of constitutional due process. * * *" *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404, 408-09 (10th Cir. 1959) (Emphasis supplied).

In holding that the prohibition of rate filings under Section 4(d) was unreasonable and therefore unlawful the court below did not suggest, as the Commission now contends (Pet. Br. p. 29), that the Commission's power to condition certificates "must yield to an uncontrollable 'right' in a producer to file rate changes

under Section 4 and to put those changes into effect." Rather, the clear import of the court's holding was that the Commission, in seeking to fulfill the aims of the Act, must use its conditioning power in a manner which is not inconsistent with other provisions of the Act. Thus, the court held that the Commission could not use its power under Section 7 to "condition-out a statutory right which Congress has prescribed" nor could it impose conditions which "obliterate specific sections of the Natural Gas Act" (R. 323, 332). In our view, the decision below is soundly based in the regulatory scheme and is in complete accord with the decisions of this Court.

A. The Court Below Correctly Interpreted the Relationship of the Rate and Certificate Sections of the Act in Accordance With This Court's Decisions in Catco, Mobile and Other Cases

The Commission contends that the decision of the court of appeals, insofar as it affirms the right of a producer to seek, without Commission approval, a determination of the justness and reasonableness of his initial contract price "improperly subordinates the Commission's vital responsibilities under Section 7" to "the producer's rights as defined by his private contract" (Pet. Br. p. 16). The Commission argues that this limitation on its conditioning power will result in an impairment of its ability to protect consumers from excessive rates and charges by holding the price line as required by the Court's decision in *Catco*. There is no merit in this argument.

The Commission's proposed moratorium on Section 4(d) rate filings, by which it obviously seeks to avoid separate determinations of just and reasonable rates

for individual producers, is clearly inconsistent with the Court's opinion in *Catco* wherein the Court specifically recognized the right of a producer to collect his initial contract price while the justness and reasonableness of the price is being determined under Section 4(e) of the Act.

In *Catco*, the Court found that, while rates were not the only factor bearing on the public convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Noting that in the absence of a certificate condition lowering the initial rate any adjustment in price as a result of a subsequent determination of a just and reasonable rate under Section 5 of the Act would be prospective only, the Court observed that:

> "In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under § 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. * * * This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under § 7 makes it the more important, as the Commission itself says, that 'this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest.' * * *" (360 U.S. at 389-90).

Accordingly, where the producer's application on its face or on the presentation of evidence signals the existence of a situation which would not be in the public interest, the Commission was admonished by the Court either to deny the permanent certificate or to condition the certificate issued in such a manner as to reduce the initial price, i.e., the rate level, at which the producer's gas would be permitted to enter the market. Where, in its discretion, the Commission chooses to condition its certificate, the Court found:

> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, United Gas Pipe Line Co. v. Mobile Gas Service Corp. (US) supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. *In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.* Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress 'to create a comprehensive and effective regulatory scheme,' Panhandle Eastern Pipe Line Co. v. Public Service Com., 332 U.S. 507, 520, 92 L. ed. 128, 139, 68 S. Ct. 190 (1947), is given full recognition. And § 7 is given only that scope necessary for 'a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to

being modified by the Commission . . . .' United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra (350 U.S. at 341). On the other hand, if unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded." (360 U.S. at 391-92) (Emphasis supplied).

In view of the foregoing language of the Court in *Catco*, it is difficult to understand how the Commission can seriously contend that the court of appeals has misconstrued or drawn incorrect inferences as to the relationship of the rate and certificate sections of the Act or how the court's decision in any way subordinates the Commission's powers under Section 7 to the rate provisions of Section 4.[6] Sections 7 and 4, described as the "heart of the Act" in *Catco* (360 U.S. at 388), are wholly compatible and, indeed, complementary sections of a single regulatory scheme. The conditioning power which the Commission insists it must now have to carry out the mandate of *Catco*

---

[6] In its brief (Pet. Br. p. 29), the Commission relies on the Court's decision in *Mobile*, 350 U.S. 332, for the proposition that Section 4(d) of the Act only authorizes the regulated company to file and put into effect rate changes "otherwise authorized" by the Commission. A fair reading of *Mobile* makes it clear that a natural gas company may file a rate increase under Section 4(d) if that increase is "otherwise authorized" in terms of its contract or tariff, not in terms of permission granted by the Commission under Section 7. Indeed, the clear meaning of *Mobile* was affirmed by the Court in *Catco* when it stated that a producer "may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, * * * file new rate schedules with the Commission" (360 U.S. at 389). The cases cited by the Commission (Pet. Br. pp. 29-32) are not inconsistent with either *Mobile* or *Catco* in this respect.

would, if anything, render Section 4 and the other sections of the Act subordinate to the provisions of Section 7(e).[7] We respectfully submit that nothing in the Court's opinion suggests such a result. Nor has the Commission's regulatory policy since *Catco* indicated any inability on the part of the Commission to carry out the Court's mandate within the framework of the Act as outlined in the Court's opinion.

Responsive to the Court's mandate in *Catco*, the Commission has, since *Catco*, held the price line in the issuance of permanent certificates to producers by what is in essence an "in line" determination based on weighted average field prices and has deferred the de-

---

[7] As the court below noted (R. 337), if the Commission can suspend statutory filing rights under Section 4, it may just as well deny producers the right of review by rehearing and petition to the courts under Section 19(b) of the Act. The court observed that this possibility was not in the realm of the academic theoretical since just such a condition had been attached to temporary certificates granted producers.

Without referring directly to its so-called "Section 19" condition, the Commission attempts to meet the implications of that condition by arguing that producers starting their sales under conditioned certificates with full knowledge of the conditions involved are equitably estopped from seeking judicial review having once availed themselves of the benefits of the certificate authority (Pet. Br. pp. 38-39). In support of its argument of equitable estoppel the Commission cites *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512. In *Callanan*, however, while holding that the transferee of conditioned certificate authority was estopped to complain of the conditions accepted by the transferor, the Court recognized that the transferor, as the original certificate holder, would have been entitled to seek judicial review "as his remedy" (345 U.S. at 513) had he done so within the time prescribed by the statute. In contrast, the Commission's Section 19 condition would preclude judicial review on the ground that the producer had received the benefits of certification, irrespective of the reasonableness of the conditions imposed.

termination of just and reasonable rates to further proceedings under Sections 4 and 5 of the Act. The Commission has followed essentially the same procedure in conditioning the prices at which it will allow producers to dedicate their gas under temporary authorization. Where the initial price set out in the producer's contract appears to be "out of line" with the guideline area price contained in the Commission's Statement of General Policy No. 61-1 (18 C.F.R. § 2.56), the Commission has uniformly conditioned the initial price in its grant of temporary authority at or below the guideline area price in the Policy Statement.

Thus, with respect to all new sales of gas by producers since the Court's decision in *Catco,* whether begun under permanent or temporary certificate authority, the Commission has followed the Court's mandate in exercising its conditioning power under Section 7 of the Act to hold the line pending a determination of just and reasonable rates under Sections 4 and 5. In so doing, the Commission has afforded consumers the full protection contemplated by the Court in *Catco,* while preserving the producer's "remedy to protect himself" (360 U.S. at 389), namely, the right to increase his rates, subject to refund, pending a determination of their justness and reasonableness under Section 4 of the Act. *Accord, Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 156.

The Commission's insistence that it must have, at a minimum, the power to prohibit rate increase filings by independent producers amounts to an argument that consumers be afforded a greater degree of protection than the Court found in *Catco* was intended by Con-

gress.[8] It represents, moreover, an assertion by the Commission that, in the exercise of its conditioning power under Section 7 of the Act, it may suspend initial prices agreed upon by the parties, notwithstanding the Court's clear holding in *Catco* that "the Commission was not given the power to suspend initial rates under § 7" (360 U.S. at 390).

Insofar as the outright denial of a certificate is concerned, i.e., the alternative to the imposition of appropriate conditions (Pet. Br. p. 22-23), we readily concede that the Commission may, for good cause, deny a permanent certificate subject, of course, to judicial review. We do not concede, however, that because the Commission has it within its power to deny a certifi-

---

[8] Citing the Court's opinion in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154, as supporting a moratorium on rate increase filings by producers, the Commission argues that rate regulation under the Act is "far from a perfect tool" and that refunds to those who have been charged excessive rates in the interim, i.e., pending the determination of just and reasonable rates, constitute a "remedy of only limited effectiveness" (Pet. Br. pp. 10-11). In Tennessee, refunds were ordered only *after* a determination under Section 4(e) that the increased rates were unlawful and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate. Indeed, in its more recent decision in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, the Court observed:

> "• • • Refund obligations, it is true, do not provide as much protection as the elimination of unreasonable rates, see *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-155, but they are undoubtedly significant and cannot be ignored, as some of the petitioners would have us do." (373 U.S. at 312).

In neither opinion did the Court indicate that refunds were so ineffective or inappropriate as to require that the company be prevented in the future, from filing rate changes under Section 4(d) of the Act.

cate it may impose, as an alternative to outright denial, certificate conditions which are unreasonable and therefore unlawful. Irrespective of whether the Commission denies or conditionally grants a certificate, its action must be consistent with the provisions of the Act and the requirements of due process.

B. The Legislative History of Section 7 Lends No Support for the Imposition of Certificate Conditions Which Are Inconsistent With and Override Other Provisions of the Act

The legislative history of the 1942 amendments to the Natural Gas Act, while helpful to a general understanding of the Congressional intent in adding Sections 7(c) and 7(e) to the Act, is largely irrelevant to the issue in this case.[9]

---

[9] It seems clear from the Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess., that the principal concern of Congress and the Commission was with the problems of the then expanding pipeline industry and the necessity for giving the Commission jurisdiction to review and regulate pipeline expansion projects while still in their promotional stage. In commenting on the proposed amendments to Section 7, Chairman Manly of the Commission stated (p. 5):

> "In that connection, Mr. Chairman, I think it is very desirable to point out this fact, that even though under the existing section a proposed pipe line may not be under the jurisdiction of the Commission, under this certification section, during the period of its financing and construction, it does become subject to the jurisdiction of the Commission the minute it begins to operate and transport and sell natural gas, so that you are confronted with the situation under the present section that during the most important period in relation to a company—namely, the period in which it is being constructed—the Commission may have no jurisdiction whatsoever and be confronted the day it begins operation with a financial structure or with a route which may have been highly undesirable from the standpoint of the public interest."

In the first place, the scope of the Commission's inquiry into the issue of public convenience and necessity in the usual producer certificate case is limited strictly to the determination of a so-called "in line" initial price in the particular producing area with all issues other than the issue of initial price being deferred for consideration to proceedings under the rate sections of the Act (see, *infra,* pp. 26-28). Secondly, and more important, the fact that a producer chooses to seek his initial contract price under Section 4 once he has begun his sale under a temporary certificate in no way inhibits the scope of the Commission's inquiry at the time of permanent certification or its power to impose lawful conditions on the permanent certificate when issued.

Even assuming that the Commission's inquiry under Section 7 were as broad in the case of independent producers as it customarily is in the case of pipelines, the examples of pipeline certificate conditions cited by the Commission in its brief (pp. 27-28) would not support the moratorium or "price freeze" condition contended for by the Commission in this case. Thus, the Commission did not impose in any of the cases cited a certificate condition precluding the company from collecting its proposed initial price or from seeking a determination of the justness and reasonableness of its proposed price under Section 4.[10]

---

[10] The Commission cites its order in *Louisiana-Nevada Transit Co.*, 2 F.P.C. 546, wherein the pipeline's certificate was conditioned to provide that the same should be cancellable in the event that the company thereafter sought to increase its price above 10 cents per Mcf. The case is hardly in point since (1) it involved non-jurisdictional sales to three industrial direct sale customers, and (2) the pipeline proposed to render service at a flat rate of 10 cents per Mcf over the life of its contracts.

Nothing in the legislative history of the Act lends support for the proposition that, in the exercise of the power to attach "reasonable" terms and conditions to certificates under Section 7(e), the Commission may nullify the intent of Congress as expressed in other provisions of the Act. On the contrary, the Court has held that "all sections of the Act must be reconciled so as to produce a symmetrical whole," *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514, a holding which repeats a fundamental rule of statutory construction applied by the Court in *United States* v. *Menasche*, 348 U.S. 528:

> "* * * 'The cardinal principle of statutory construction is to save and not to destroy.' N.L.R.B. v. Jones & L. Steel Corp., 301 U.S. 1, 30, 81 L. ed. 893, 907, 57 S. Ct. 615, 108 ALR 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v. Ramsdell, 107 U.S. 147, 152, 27 L. ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires. * * *" (348 U.S. at 538-39).

Consistent with these holdings, the Court of Appeals for the District of Columbia recently resolved an alleged conflict between the broad grant of authority in Section 16 of the Act[11] and the provisions of Sections 4(d) and (e). The court, in language pertinent to this case, held that:

---

[11] Section 16 provides, in part, that "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act." 52 Stat. 830 (1938), 15 U.S.C. § 717o.

"* * * [T]he broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the Mobile opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation * * * would deny to [the natural gas company] the right to change rates at which it offers service, which the Mobile decision says is the right of a natural gas company. Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission." *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F. 2d 245, 250 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975.

C. The Distinction Between Temporary and Permanent Certificate Authorization Does Not Justify a Prohibition of Rights Otherwise Accorded Natural Gas Companies Under the Act

The Commission contends that, irrespective of the scope of its conditioning power with respect to permanent certificates, it may lawfully require that an independent producer selling his gas under temporary sales authorization forego the right to change his rates under Section 4 until such time as the Commission determines whether he should be granted a permanent certificate. Noting that temporary authorization is normally granted without notice or hearing, upon the

producer's *ex parte* showing of threatened economic loss, the Commission argues that no record basis exists for determining whether the proposed initial price is in line within the meaning of the Court's decision in *Catco* at the time the temporary certificate is sought. Pending a hearing under Section 7(e) to determine whether the initial price is in the public convenience and necessity and, therefore, whether a certificate should be issued, the producer must be denied access to the rate changing procedures of Section 4; otherwise, it is argued, "[t]he damage may be done even before the hearing on the application for permanent authority is held" (Pet. Br. p. 34).

The Commission's argument is erroneous for two reasons. First, as a practical matter, there is little if any distinction for the producer between temporary and permanent certificate authorization since, once he begins his sale under temporary authorization, whether at his initial contract price or at a reduced price acceptable to the Commission, he becomes as much "a captive subject to the jurisdiction of the Commission" (360 U.S. at 389) as a producer holding a permanent certificate of public convenience and necessity. As the court below noted (R. 334), he becomes subject "to all of the regulations, restraints and duties of a natural gas company," and we do not understand the Commission to contend otherwise in its brief.

As for the implication that the procedure for the issuance of temporary certificates is so summary as to increase the likelihood of improvident grants, the Commission's rules require that a producer supply all of the information needed for permanent certification

at the time he seeks temporary authorization.[12] We know of no instance where, after notice and hearing under Section 7(e), the Commission has directed the cessation of a sale begun under a temporary certificate based on a finding that the public interest did not require a continuation of the sale. Rather, the Commission has consistently taken the position that it would lack statutory authority to order an abandonment of a sale, absent the filing of an application by the producer under Section 7(b) of the Act. See, *e.g.*, *Socony Mobil Oil Co.*, 27 F.P.C. 675, 676.

The second fundamental error in the Commission's argument in support of a moratorium condition on temporary certificates involves its reliance on the Court's decision in *Catco* as requiring that it hold the price line pending the determination of the initial price issue in a subsequent hearing on the application for a permanent certificate. In *Catco*, the Court directed the the Commission to use its Section 7 conditioning power to hold the line "while the justness and reasonableness of the price fixed by the parties is being

---

[12] As a prerequisite to invoking the provision for temporary authorization under Section 157.28 of the Commission's rules (18 C.F.R. § 157.28), a producer must file his sworn application for a permanent certificate of public convenience and necessity, together with a rate schedule for the proposed sale consisting of the basic contract with the pipeline purchaser and all amendments and supplements thereto. The contents of the application are described in detail in Section 157.24 of the rules (18 C.F.R. § 157.24) (see, *infra*, pp. 39-44).

As the Commission notes in its brief (p. 36n), new procedures have recently been instituted under which the Commission decides uncontested producer certificate cases without a public hearing where the initial price is at or below the area level and no protest has been filed. See FPC Press Release No. 12733, dated June 17, 1963.

determined *under other sections* of the Act" (360 U.S. at 392; emphasis supplied). The Court further held that the Commission was not required to make a determination of just and reasonable rates in a Section 7 certificate case, and the Commission has consistently refused to do so.

Since *Catco*, as we have previously indicated (*supra*, p. 21), the Commission has confined the scope of its inquiry in producer certificate cases to a determination of the "in line" weighted-average price in the area at the time the producer contract in issue was executed.[13] In so doing, the Commission has uniformly held that cost of service and financial requirements evidence, whether on an individual company or area-wide basis, is not relevant to a determination of the public convenience and necessity under Section 7.[14] That the Commission does not propose to determine just and reasonable rates in conjunction with certificate proceedings under Section 7(e) was made abundantly clear in the recently concluded Southern Louisiana omnibus certificate proceedings at Commission Docket Nos. G-13221,

---

[13] *E.g.*, *Skelly Oil Co., et al.*, 28 F.P.C. 401, 411.

[14] Thus, in its recent Opinion No. 398, affirming an intermediate decision by the presiding examiner, the Commission stated:

> "* * * In particular, we affirm the decision as to its holding that economic and financial evidence, whether on an individual company or on an area-wide basis and whether of the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs, plays no part in and is irrelevant to the determination of the initial price question in independent producer certificate cases * * *" *Placid Oil Co., et al.*, Docket Nos. G-13183, *et al.*, Opinion No. 398, issued July 17, 1963 (mimeo. p. 5).

et al.,[15] where the presiding examiner stated, in his initial decision:

> "* * * Our main interest, following the directions of *Catco*, is to halt, rather than follow, the trend of the Southern Louisiana market. In following that interest, as concluded in the prior section hereof, we adopt the method of concentrating on Commission certifications which do not express erroneous principles or pricing policies.
>
> "Of course 'This method is circular in that present Commission action is judged solely by measuring it against past Commission action.' (Continental reply brief, p. 6). If the method were to be used indefinitely, valid objection would lie. The objection does not, however, apply to a price line which is only a 'stop-gap device' with the 'objective of providing simple, direct, and effective stop-gap protection for the consuming public.' *U.G.I.* v. *F.P.C.*, *supra*, 283 F. 2d at 822, 823. We are freezing prices until the determination of the Southern Louisiana Area Rate Proceeding, and no longer. We are involved with a temporary expedient which gives no consideration to value of gas service, reasonable return, or other aspects of fair and reasonable rates. The open market's only relevance is, that it 'signals the

[15] In severing over 360 pending producer certificate applications from the Southern Louisiana Area Rate Proceeding in Docket Nos. AR61-2, *et al.*, the Commission stated its purpose in the following language:

> "The Commission, by this order and proceeding, will be enabled to determine those initial prices which are required by the public convenience and necessity for the sale of gas in interstate commerce from the South Louisiana area, without the delay which is attendant upon the determination of just and reasonable rates. * * *". *Union Texas Petroleum, et al.*, Docket Nos. G-13221, *et al.*, Order issued December 31, 1962 (mimeo. p. 10).

existence of a situation that probably would not be in the public interest.' *Catco, supra,* 360 U.S. at 391, speaking of any application reflecting the market." *Union Texas Petroleum, et al.,* Docket Nos. G-13221, *et al.,* Initial Decision issued January 14, 1964 (mimeo. p. 50).

It would thus appear that the effect of the moratorium is the same whether applied to a temporary certificate or to a permanent certificate issued after notice and hearing under Section 7(e). In either case, Section 4 of the Act is nullified and, with it, the remedy afforded the producer to relieve himself of having to continue his sale at rates which are less than just and reasonable.[16] The condition is therefore unreasonable and beyond the power of the Commission to impose.[17]

---

[16] We fail to understand how the decision of the Fourth Circuit in *South Carolina Generating Co.* v. *Federal Power Commission,* 249 F. 2d 755, can support the Commission's argument in this case. There is no question here of Respondents' willingness to abide by their contracts. Moreover, Section 5 of the Natural Gas Act only provides for the institution of a rate investigation on the Commission's own motion or "upon complaint of any State, municipality, State commission, or gas distributing company." 15 U.S.C. §717d(a).

[17] The Commission's reliance on *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494, is misplaced. In *Alabama-Tennessee,* the pipeline company, unlike Respondents below, agreed to and in fact requested the condition requiring that it maintain its interim tariff in effect during a fourteen-month period following the commencement of operations. By contrast with Respondents who were required to reduce their initial contract price pending further order of the Commission on their applications for permanent certificates, Alabama-Tennessee was allowed to collect tariff rates during its developmental period which were *higher* than those which it had originally proposed. When it sought to continue the collection of the higher interim rates at the expiration of the development period, the Commission rejected its proffered rate filing and entered upon a hearing under Sections

II.

THE MORATORIUM ON RATE INCREASE FILINGS CANNOT BE JUSTIFIED AS A STOPGAP MEASURE PENDING THE DETERMINATION OF JUST AND REASONABLE AREA RATES SINCE IT IS IN BASIC CONFLICT WITH THE REGULATORY SCHEME ENVISAGED BY CONGRESS

On analysis, the Commission's argument in support of a moratorium on rate increase filings by producers under Section 4 is nothing more than an argument of administrative convenience in furtherance of its area pricing approach to producer regulation. While undoubtedly desirable from the Commission's standpoint as a means of avoiding time-consuming individual Section 4(e) determinations of just and reasonable rates, the concept of a rate "freeze" is alien to the regulatory scheme of the Act prescribed by Congress.

In the *Hope* case,[18] the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. That this purpose was to be accomplished under an act which did not contemplate a rate freeze

---

5 and 7 of the Act to determine not only a satisfactory form of tariff but the "just, reasonable, non-preferential [and] non-discriminatory rate" to be thereafter observed (10 F.P.C. 1638, 1640). A subsequent rate increase filing, made in the course of the hearing, was rejected on the ground that the issue of what was a just and reasonable rate for the company was then being determined. The interim rates originally proposed by the company were continued in effect until reduced at the conclusion of the hearing.

Thus, in *Alabama-Tennessee*, the Third Circuit did not have before it an order which purported to make it impossible for the company, without prior Commission consent, to seek a determination of the justness and reasonableness of its initial rate, nor did it have before it an order which prevented the pipeline from collecting its proposed initial rates pending the outcome of future proceedings.

[18] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591.

was made clear by the Court in *Bowles* v. *Willingham*, 321 U.S. 503, decided the same term as *Hope*, when it distinguished the Natural Gas Act from a price freeze statute, declaring that the Act is a price-fixing statute in which "Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons and companies" (321 U.S. at 516-17).[19]

Moreover, while recognizing in *Hope* and *Catco* that the underlying Congressional purpose was to protect the consumer from excessive charges, the Court has held that the consumer has an interest not only in the price he pays for gas but also in an assured and continuing supply of the commodity itself, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103.[20] To that end, the Court

---

[19] In *Bowles* v. *Willingham*, the Court noted that a landlord who was precluded under the Emergency Price Control Act of 1942 from receiving a fair and equitable rent for his particular property had no cause to complain that the Act worked an unconstitutional taking of his property since the Emergency Act provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent" (321 U.S. at 517). In contrast, the Natural Gas Act requires that a jurisdictional sale, once begun, may not be abandoned without prior Commission approval under Section 7(b). See *Catco*, 360 U.S. at 389.

[20] In *Memphis*, the Court observed that:

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; * * *" (358 U.S. at 113).

has recognized that rates fixed by the Commission must be just and reasonable both to the consumer and to the natural gas company. Most recently, in commenting on the Commission's proposed area rate proceedings, the Court said that the rates ultimately fixed should not be "so high as to deprive consumers, or so low as to deprive producers, of their right to a just and reasonable rate," *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 310. Finally, in *Catco* and in *Sunray*[21] the Court held that the producer's one remedy to protect himself from being required to sell his gas at a price which was less than just and reasonable and therefore confiscatory lay in his right to increase his price under Section 4(d) in accordance with his contract. While the Act would give the Commission the right to suspend the collection of the increased price for a period of five months, there is no suggestion in the legislative history of the Act or in this Court's decisions interpreting the Act that Congress intended a moratorium period of greater duration.

Assuming, as the Court has indicated, that individual producers of natural gas are entitled to recover just and reasonable rates, the impact of a condition imposing a moratorium on their right to seek their initial contract prices in the manner prescribed by Congress is immediately obvious. Under the Act, the Commission has no power to fix rates retroactively, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618. Therefore, unless permitted to file and collect his initial contract price subject to refund under Section 4(e), the producer will be forced to await a purely prospective determination of the just-

[21] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156.

ness and reasonableness of his rate in a Section 5 area proceeding. If, at the conclusion of that proceeding, it is subsequently determined that his initial contract price is just and reasonable, the producer will have been forever deprived of the just and reasonable rate to which he was entitled in the intervening period.

As an administrative agency created by Congress, the Commission has only those powers conferred by Congress.[22] In the exercise of those powers, the Commission is under a duty to give effect to all sections of the Act which it administers. Accordingly, we respectfully submit that the Commission may not, for considerations of administrative convenience, nullify Section 4 of the Natural Gas Act and, with that section, the producer's only remedy against confiscation.

CONCLUSION

For all of the foregoing reasons, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT W. HENDERSON
THOMAS G. CROUCH
700 Mercantile Bank Building
Dallas, Texas 75201

ROBERT E. MAY
RICHARD F. GENERELLY
JOHN T. KETCHAM
May, Shannon and Morley
1700 K Street, N. W.
Washington, D. C. 20006

Attorneys for Respondents,
H. L. Hunt, et al.

January 29, 1964

[22] See, *e.g.*, *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322.

APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in

any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative, without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has

not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * * * * *

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classifica-

tion, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717d(a)]

* * * * * * * *

Sec. 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted

thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

* * * * * * * *

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended; 15 U.S.C. § 717r(b)]

2. The Commission's Regulations Under the Natural Gas Act, 18 C.F.R., Subchapter E, as amended, provide in pertinent part:

§ 157.24 Contents of applications.

(a) Every application for a certificate of public convenience and necessity required under § 157.23 shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by subparagraph (1) of this paragraph with respect to any predecessor in

interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (*a*) produced by applicant or predecessor and (*b*) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (*a*) at wholesale or (*b*) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under subdivision (iii) of this subpara-

graph) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application (§ 157.23).

(v) Any major appurtenant properties and facilities such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(5) A summary, on the form indicated in § 250.0 of each contract for sale or transportation of gas for which a certificate is requested.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 Necessary exhibits.

There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under § 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A (§ 157.23). The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a) (4) (iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

§ 157.26 Form of filing.

Except with respect to the number of copies required, an application filed under § 157.23 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall

include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 Other information.

Upon request by the Secretary, applicant shall submit such additional data, information, exhibits, or other detail as may be specified.

§ 157.28 Temporary authorizations.

Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however*, That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown.

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or

are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.